

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 158

FROZEN FOOD EXPRESS, APPELLANT,

vs.

**UNITED STATES AND INTERSTATE COMMERCE
COMMISSION**

No. 159

**INTERSTATE COMMERCE COMMISSION,
APPELLANT,**

vs.

FROZEN FOOD EXPRESS, ET AL.

No. 160

**AMERICAN TRUCKING ASSOCIATIONS, INC.,
ET AL., APPELLANTS,**

vs.

FROZEN FOOD EXPRESS, ET AL.

No. 161

**ANRON, CANTON AND YOUNGSTOWN RAILROAD
COMPANY, ET AL., APPELLANTS,**

vs.

FROZEN FOOD EXPRESS, ET AL.

**ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS**

FILED JUNE 17, 1955

JURISDICTION NOTED OCTOBER 10, 1955

SUPREME COURT OF THE UNITED STATES

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**IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS, HOUSTON
DIVISION**

FROZEN FOOD EXPRESS, Plaintiff,

VS.

**UNITED STATES OF AMERICA and INTERSTATE COMMERCE
COMMISSION**

**AMENDED BILL OF COMPLAINT, IN CIVIL ACTION No. 8285—
Filed July 12, 1954**

To the Said Honorable Court:

Frozen Food Express, a corporation, complainant, files this its Amended Bill of Complaint against the United States of America and the Interstate Commerce Commission, and says that this action is prosecuted for the following purposes:

(1) To enjoin, annul and set aside that certain Order and Notice of the Interstate Commerce Commission of April 13th, 1951 in Docket No. MC-C-968 "Determination of Exempted Agricultural Commodities", which Order is reported in Volume 52, Interstate Commerce Commission Reports, Motor Carrier Cases, Pages 511 through 566, inclusive, which decision and Order is made a part hereof by reference.

(2) To enjoin the Interstate Commerce Commission from interfering or in any manner interrupting the operations of the complainant transporting agricultural commodities (not including manufactured products thereof) between all points within the forty-eight states and the District of Columbia of the United States of America.

Jurisdiction is invoked under 28 U.S.C.A. 1337, 1398 and 2321, et seq., 5 U.S.C.A. 1009, all as will more fully appear hereinafter.

I

Frozen Food Express is a Texas corporation, duly organized and qualified to do business in the State

of Texas and with a place of business in Houston, Harris County, Texas in the Southern District of Texas.

The Interstate Commerce Commission is a Federal Administrative agency existing under the laws of the United States and by virtue of the Interstate Commerce Act as amended and has jurisdiction over the regulation of the transportation of property for hire moving via common carrier motor carrier in interstate or foreign commerce over public highways to the extent specified in the Interstate Commerce Act, Parts One and Two (49 U.S.C.A. 5, 301-325).

II

Frozen Food Express is the owner and holder of Certificate of Public Convenience and Necessity No. MC-108207 and issued by the Interstate Commerce Commission under the provisions of the Interstate Commerce Act, Parts One and Two, authorizing the transportation of certain commodities between points and places in the States of Arizona, Arkansas, California, Colorado, Illinois, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, New Mexico, Oklahoma, Tennessee, Texas and Wisconsin. (A copy of the Certificate is attached hereto and identified as Exhibit B and made a part hereof.)

III

Frozen Food Express, in addition to the transportation of commodities as authorized by the Interstate Commerce Commission as a common carrier motor carrier, is transporting and has been transporting since the enactment of Part Two of the Interstate Commerce Act, Title 49 Paragraph 303(b)(6) commodities consisting of agricultural commodities (not including manufactured products thereof) between various points in the United States. That on such occasions when the vehicles of complainant are transporting agricultural commodities such motor vehicles are not used in carrying any other property or passengers for compensation. That, under the provisions of said Part Two of the Interstate Commerce Act, Title 49, Paragraph 303(b)(6) U.S.C.A., complainant has a right to transport [fol. 16] agricultural commodities (not including manufactured products thereof) between all points and places for

hire in the 48 states and the District of Columbia without securing any character of certificate or permit from the Interstate Commerce Commission. That included in, but not limited to, such agricultural commodities are slaughtered cattle, fresh meat, meat products, frozen whole eggs, dried egg powder, dried egg yolks, cottage cheese, cream cheese, clean rice, rice bean, rice polish, pasteurized milk, fresh cut up vegetables in cellophane bags and fresh vegetables washed, cleaned and packaged in cellophane bags or boxes, fruits or vegetables, quick frozen, shelled peanuts, peanuts shelled ground, killed and picked poultry (although not drawn), rolled barley, butter, coffee ground or roasted, cotton seed meal or hulls, beans, packaged, dried artificially or packed in small containers for retail trade, fruits and vegetables canned, dried fruits, dried mechanically or artificially, peaches peeled, pitted and placed in cold storage in unsealed containers, strawberries canned in syrup in unsealed containers and placed in cold storage, milk condensed, skimmed, powdered, butter-milk, Vitamin D and pasteurized, feathers, frozen meat, frozen dressed poultry.

Frozen Food Express, as aforesaid, has not sought any authority from the Interstate Commerce Commission to transport such commodities for hire for the reason that such commodities, as well as all agricultural commodities (not including manufactured products thereof), are exempted under the provisions of the Interstate Commerce Act, Part Two (supra).

IV

That notwithstanding the plain and unambiguous language of the Interstate Commerce Act in exempting agricultural commodities (not including manufactured products thereof) the Interstate Commerce Commission has by its Order decided April 13th, 1951 in the "Determination of Exempted Agricultural Commodities", 52 M.C.C. 511-566 narrowed the commodities exempted under Section 303(b) (6) of the Interstate Commerce Act and as a result of such Order of the Interstate Commerce Commission complain- [fol. 17] ant is deprived of the right granted under such exemption to transport agricultural commodities (not including manufactured products thereof), and that said finding and Order of the Commission in the Determination of

Exempted Agricultural Commodities case is arbitrary, unreasonable, capricious and unjust to complainant and constitutes an abuse of the Interstate Commerce Commission's discretion and transgression of its statutory power and authority and that said finding and Order issued by the Interstate Commerce Commission in the Determination of Exempted Agricultural Commodities case, 52 M.C.C. 511-566 is unlawful and void for the following reasons:

1. The Interstate Commerce Commission has no power and authority to compel complainant to secure any Certificate of Public Convenience and necessity from it when the complainant is transporting agricultural commodities (not including manufactured products thereof) and not using its motor vehicles in such transportation in carrying any other property or passengers for compensation because the Congress of the United States has specifically exempted such commodities from the certificate provisions of the Interstate Commerce Act.

2. The decision and Order in the Determination of Agricultural Commodities case by the Interstate Commerce Commission is in effect an abrogation of the complainant's rights to transport agricultural commodities (not including manufactured products thereof) under the provisions of 303(b)(6).

3. The findings contained in the Order in the Determination of Exempted Agricultural Commodities case (supra) are contrary to the lawful authority of the Interstate Commerce Commission.

4. That such findings and Order in the Determination of Exempted Agricultural Commodities case (supra) constitute an unwarranted and unlawful invasion of the power and authority of the Congress of the United States in that such findings and Order repeal and modify and restrict a law passed by the Congress of the United States and that the Interstate Commerce Commission is without such power [fol. 18] and authority under the Interstate Commerce Act.

V

Notwithstanding the express exemption exempting agricultural commodities (not including manufactured products thereof) from the jurisdiction of the Interstate Commerce

Commission, the Commission is threatening to enjoin complainant's transportation of such exempted agricultural commodities (not including manufactured products thereof) and is threatening to file complaints against complainant and unless this Honorable Court enjoins and restrains the Interstate Commerce Commission from enforcing or recognizing the Determination of Exempted Agricultural Commodities decision and Order that complainant will be deprived of the right granted to it under the laws of the United States, and that complainant should have such relief to which it is entitled in law and in equity.

Wherefore, complainant prays that respondent be cited to appear and answer herein and that upon final hearing herein the Order in the Determination of Exempted Agricultural Commodities (supra) be annulled, enjoined, cancelled and set aside and that the interstate Commerce Commission and the United States of America be permanently enjoined and restrained from enforcing or recognizing said findings and Order and that the respondent be permanently and perpetually enjoined and restrained from interfering with the complainant's transportation of agricultural commodities as authorized under the provisions of Section 303(b)(6) and Part Two of the Interstate Commerce Act and that complainant have all other and further relief, at law or in equity, to which it may be entitled, and for its costs.

Phinney and Hallman, 617 First National Bank
Bldg., Dallas, Texas, By (S.) Carl L. Phinney, At-
torneys for Frozen Food Express, Complainant.

File Connally, Judge, 7/12/54.

[fol. 19]

EXHIBIT "B"

Certificate of Public Convenience and Necessity

No. MC 108207 Sub 1*

Frozen Food Express, A Corporation,

Dallas, Texas

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 18th day of June, A.D. 1952

After due investigation, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

It is ordered, That the said carrier be, and it is hereby, granted this Certificate of Public convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

It Is Further Ordered, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

Irregular Routes:

Frozen foods, and meats, meat products, and meat byproducts as defined by the Commission (except canned or packaged meats and canned or packaged meat products, other than canned hams, packaged hams, and packaged bacon), dairy products as de-

* This certificate embraces the operations authorized in No. MC 108207 Sub 1, as modified by order dated April 21, 1952.

fined by the Commission, *salad dressing, yeast, and uncooked bakery goods.*

Between points in Texas, Louisiana, Illinois, Michigan, Oklahoma, Missouri and Arkansas.

Between Memphis, Tenn., on the one hand, and, on the other, points in Texas, Louisiana, Michigan, Oklahoma, Missouri and Arkansas.

Between points in Mississippi, on the one hand, and, on the other, points in Arkansas on U.S. Highway 61, and Little Rock, Ark.

Frozen foods, and meats, meat products, and meat byproducts as defined by the Commission (except canned or packaged meats and canned or packaged meat products, other than canned hams, packaged hams, and packaged bacon),

Between points in Mississippi, on the one hand, and, on the other, points in Texas, Louisiana, Illinois, Michigan, Oklahoma, and Arkansas (except points in Arkansas on U.S. Highway 61 and Little Rock, Ark.).

Between Memphis, Tenn., on the one hand, and, on the other, points in Illinois and Mississippi.

Restriction: The service authorized herein is restricted against the following described transportation:

Commodities specified in first paragraph above except frozen foods and fresh meats,

Between New Orleans, La., on the one hand, and, on the other, points in Illinois, points in Arkansas on U.S. Highway 61, Little Rock, Ark., and Memphis, Tenn.

Between Chicago, Ill., on the one hand, and, on the other, points in Arkansas on U.S. Highway 61, and Little Rock, Ark.

Between Memphis, Tenn., on the one hand, and, on the other, points in Arkansas on U.S. Highway 61, and Little Rock, Ark.

[fol. 20] *Commodities* specified in first paragraph above except fresh meats,

Between St. Louis, Mo., on the one hand, and, on the other, New Orleans, La., Memphis, Tenn., Little Rock, Ark., and points in Arkansas on U.S. Highway 61.

Fresh meats,

From Memphis, Tenn., to points in Illinois.

Fresh meats and frozen meat carcasses,

Between Dallas and Fort Worth, Tex., on the one hand, and, on the other, points in Texas, Louisiana, Oklahoma, Arkansas, and Mississippi.

Commodities, specified in first paragraph above, except frozen food and carcass meat,

Between points in the Kansas City, Mo.-Kansas City, Kans., Commercial Zone as defined by the Commission, on the one hand, and, on the other, points in Oklahoma, Texas, and the Chicago, Ill., Commercial Zone as defined by the Commission.

Fresh or frozen meats, in packages, boxes, or barrels,

From points in the Kansas City, Mo.-Kansas City, Kans., Commercial Zone as defined by the Commission, to points in Louisiana.

Oleomargarine, butter, shortening, yeast, salad dressing and cheese,

Between points in Texas, on the one hand, and, on the other, points in Oklahoma, and Shreveport, La., Little Rock, Ark., and Memphis, Tenn.

Commodities, specified in first paragraph above, except frozen foods,

From points in the St. Louis, Mo.-East St. Louis, Ill., Commercial Zone as defined by the Commission, to points in the Chicago, Ill., Commercial Zone as defined by the Commission.

Unfrozen fresh poultry.

From Springdale and Benton, Ark., to points in the Chicago, Ill., Commercial Zone as defined by the Commission.

It is Further Ordered, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

And It Is Further Ordered, That this certificate shall supersede the certificate issued in this proceeding on July 28, 1950, which is hereby canceled.

By the Commission, division 5.

W. P. Bartel, Secretary.

(Seal)

[fol. 21]

Certificate of Public Convenience and Necessity

No. MC 108207 Sub 3

Frozen Food Express,

A Corporation,

Dallas, Texas

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 28th day of January, A.D., 1949

After Due Investigation, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding:

It Is Ordered, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity.

sity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

It Is Further Ordered, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

Frozen foods, fresh meats, and fruits and vegetables in mechanically refrigerated equipment, over irregular routes,

Between points and places in California, on the one hand, and, on the other, points and places in Louisiana and that part of Texas on and east of a line beginning at the Oklahoma-Texas State Line and extending along U.S. Highway 83 to junction U.S. Highway 290, thence along U.S. Highway 290 to Sonora, Tex., thence along U.S. Highway 277 to the United States-Mexico boundary line, traversing New Mexico and Arizona for operating convenience only.

And It Is Further Ordered, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

By the Commission, division 5.

W. P. Bartel, Secretary.

(Seal)

[fol. 22]

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Certificate of Public Convenience and Necessity

No. MC 108207 Sub 8

Frozen Food Express,

A Corporation,

Dallas, Texas

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 13th day of January, A.D., 1950

After Due Investigation, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

It Is Ordered, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

It Is Further Ordered, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

Irregular Routes:

Condensed milk and cream in vehicles equipped for protection against heat and cold,

From Ladysmith, Wis., to points and places in Texas.

Cheese in vehicles equipped for protection against heat and cold,

From points and places in Wisconsin to points and places in Texas.

From Nashville, Shelbyville, and Carthage, Tenn., to points and places in Oklahoma, Louisiana, and Texas.

From Plymouth, Monroe, Milwaukee, and Green Bay, Wis., to points and places in Oklahoma, Arkansas, Mississippi, and Louisiana.

Frozen foods, in vehicles equipped for protection against heat and cold,

From Memphis, Tenn., to Dallas, Tex., and points and places in Oklahoma.

From Nashville, Tenn., to points and places in Oklahoma.

Frozen eggs, in vehicles equipped for protection against heat and cold,

From Enid, Okla., and Dallas and Houston, Tex., to Nashville, Tenn.

Return with no transportation for compensation except as otherwise authorized.

Authority is granted to traverse Iowa, Illinois, Missouri, and Kansas, for operating convenience only.

And It Is Further Ordered, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

By the Commission, division 5.

W. P. Bartel, Secretary.

(Seal)

[fol. 23] Certificate of Public Convenience and Necessity

No. MC 108207 Sub. 12

Frozen Food Express, a Corporation, Dallas, Texas

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 5th day of December, A. D., 1950

After Due Investigation, It appearing that the above-named carrier has complied with all applicable provisions

of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

It Is Ordered, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

It Is Further Ordered, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

Frozen foods and fresh meats, over irregular routes,

Between Memphis, Tenn., and points in Arkansas, Louisiana, and Texas, on the one hand, and, on the other, points in Iowa, Kansas, and Nebraska, traversing Colorado, Illinois, Kentucky, Mississippi, Missouri, and Oklahoma for operating convenience only,

Restriction: The Service authorized herein is restricted to the transportation of frozen foods and fresh carcass meat between points in that part of the Kansas City commercial zone, as defined by the Commission, situated in Kansas, on the one hand, and, on the other, points in Louisiana and in that part of Texas on, east, and south of a line beginning at the Oklahoma-Texas State line and extending over U. S. Highway 281 to San Antonio, Tex., thence west along U. S. Highway 90 to Del Rio, Tex., and thence south over U. S. Highway 277 to the International Boundary line between the United States and Mexico, and further restricted to the transportation of frozen foods (a) from Coffeyville, Topeka, and Wichita, Kan., to points in Texas, and (b) from Topeka and Wichita, Kan., to Memphis, Tenn., and points in Ark.

And it Is Further Ordered, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

By the Commission, division 5.

W. P. Bartel, Secretary. (Seal.)

[fol. 24] Certificate of Public Convenience and Necessity

No. MC 108207 Sub. 17

Frozen Food Express, a Corporation, Dallas, Texas

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 28th day of November, A. D. 1952

After Due Investigation, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

It Is Ordered, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

It Is Further Ordered, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

Irregular Routes,

Boneless beef, in brine,

From Laredo, Tex., to points in California, with no transportation for compensation on return except as otherwise authorized.

Uncooked biscuits.

From Los Angeles, Calif., to Shreveport, La., and to points in Texas on and east of a line beginning at the Oklahoma-Texas State line and extending along U. S. Highway 83 through Guthrie, Aspermont, Abilene, and Eden to junction U. S. Highway 290, thence along U. S. Highway 290 to Sonora, Tex., thence along U. S. Highway 277 through Del Rio to the United States-Mexico boundary line, with no transportation for compensation on return except as otherwise authorized.

Dressed poultry,

From Brownwood, Paris, Taylor, Waco, and Yoakum, Tex., to Fontana, Fresno, San Francisco, and Los Angeles, Calif., with no transportation for compensation on return except as otherwise authorized.

And it is Further Ordered, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

By the Commission, division 5.

George W. Laird, Acting Secretary. (Seal.)

[fol. 25]. Certificate of Public Convenience and Necessity

No. MC 108207 Sub. 24

Frozen Food Express, a Corporation, Dallas, Texas

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 21st day of April, A. D. 1954

After Due Investigation, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission

to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

It Is Ordered, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

It Is Further Ordered, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

Irregular Routes:

Meats, meat products, and meat byproducts,

Between points in Jackson County, Kans., on the one hand, and, on the other, points in Louisiana, and those in Texas located on, east and south of a line beginning at the Oklahoma-Texas State line and extending along U. S. Highway 281 to San Antonio, Tex., thence along U. S. Highway 90 to Del Rio, Tex., and thence along U. S. Highway 277 to the boundary of the United States and Mexico.

From Wichita, Kans., to points in Texas, with no transportation for compensation on return except as otherwise authorized.

Meats, meat products, and meat byproducts, except fresh meats,

Between points in Louisiana and Texas, on the one hand, and, on the other, points in Iowa, except Ottumwa, and points in Nebraska and Kansas, except those situated in the Kansas City, Mo.-Kansas City, Kans., Commercial Zone, as defined by the Commission.

And it Is Further Ordered, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure

so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

By the Commission, division 5.

George W. Laird, Secretary. (Seal.)

[fol. 26] IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed
August 9, 1954

The allegation in the unnumbered first paragraph of both the original and amended complaint, states that the complaint, in both instances, was filed against the United States of America and the Interstate Commerce Commission. It is therefore assumed that said Commission is a party defendant to this action without further intervention as authorized in 28 U. S. C. 2323.

The Interstate Commerce Commission, hereinafter called the Commission, reserving all advantage and benefit of exception to errors of the complaint, for answer thereunto, in so much as deemed material, answers and says:

I

Answering allegations of preliminary paragraphs (1) and (2), and paragraphs I and II of the Amended Complaint, the Commission admits that plaintiff is a Texas corporation with a place of business in Houston in the Southern District of Texas, and is authorized to operate, in interstate commerce, as a common carrier by motor vehicle within the limits of authority granted by the Commission under certificates of public convenience and necessity issued to it, and that this Court has jurisdiction of the action herein and venue of the parties thereto.

II

The Commission denies the allegations of paragraph III of the amended complaint, that plaintiff has not sought any

authority from the Commission to transport commodities such as therein specified and claimed to be exempt from regulations of motor carriers under Part II of the Interstate Commerce Act, Section 203 (b) (6), (49 U. S. C. 303 (b) (6)), and it is alleged that plaintiff has applied for, been granted and issued, certificates of such authority, as disclosed in part by the six copies of certificates attached to the amended complaint, which are here admitted to be correct copies thereof. It is further denied that plaintiff is authorized to transport for hire the specific commodities named in said paragraph, between all points and places in the forty-eight States and the District of Columbia, except as authorized by certificates of public convenience and necessity granted and issued by the Commission, or of "agricultural commodities (not including manufactured products thereof)" under 49 U. S. C. 303 (b) (6), except as have been determined by the Commission to come within that exemption, as fully set forth in its report of April 13, 1951, Docket No. MC-C-968, *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511.

[fol. 28] Further answering the allegations of said paragraph III, that plaintiff, since enactment of Part II of said Act, has been transporting agricultural commodities (not including manufactured products thereof), under 49 U. S. C. 303 (b) (6), beyond the limits of certificates issued to it, or beyond the limits of exemption of such agricultural commodities as interpreted and defined in 52 M. C. C. 511, is neither admitted nor denied because of lack of information and knowledge thereof.

III

The Commission denies the allegations of paragraph IV, 1, 2, 3, and 4 of the complaint as amended.

IV

The Commission denies the allegations of paragraph V of the amended complaint, with the explanation that it has taken no official action which could be construed as a threat to enjoin, or file complaint seeking to enjoin, plaintiff's operations, and the Commission has not been officially advised of any such threats or warnings as may possibly

cidental to the preparation of peanuts for market. In the absence of any objection we allow the incorporation by reference in the title proceeding of the pertinent testimony and exhibits relative to peanuts.³

Unless otherwise indicated, those filing exceptions to the examiner's findings will hereinafter be called **exceptants**, and those filing replies to the exceptions will be called **repliants**.

[Vol. 103]

The Issue in General

Section 203 (b) (6), so far as here material, provides as follows:

Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include . . .

(6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or *agricultural commodities (not including manufactured products thereof)*, if such motor vehicles are not used in carrying any other property, or passengers for compensation; * * * [Emphasis supplied]

The primary issue here is the determination of the meaning of the underscored words. The institution of the investigation into and concerning these words stemmed from petitions filed by the Secretary of Agriculture and numerous agricultural interests in the *Harwood* case. In that case, Harwood sought a permit authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle of fruits and vegetables, fresh and frozen, between points in Michigan, Ohio, Indiana, and Illinois, over irregular routes. One of the shippers supporting the application was a dealer in fresh fruits and vegetables and the other was engaged in the preparation of fresh vegetable salads and spinach. The salads consist of cut-up vegetables which have been washed and cleaned and are ready for use when

³ The matter incorporated by reference consists of testimony found on pages 110 to 313, inclusive, of the transcript in No. MC-89207 and exhibits 7 to 23, inclusive.

have been made by some of its subordinate officials or agents.

V

The Commission alleges further that it instituted, upon its own motion, the proceeding in *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511, because of the widespread confusion as to the meaning of the provision, in Section 203 (b) (6) of the Interstate Commerce Act, exempting from regulations of the Act "Agriculture" commodities (not including manufactured products thereof)", [fol. 29] which resulted in many different interpretations by shippers, carriers, and conflicting court decisions on the subject, all of which required the official interpretation of the Commission, the only agency of the Government charged with the responsibility of application and enforcement of the Interstate Commerce Act. Many interests directly or indirectly interested in the subject of interstate transportation, and agriculture as related thereto, participated in that proceeding, and their views and evidence, as offered, were given careful consideration by the Commission in making its interpretation of said statute, as is fully set forth in said report of April 13, 1951.

VI

The Commission further alleges that all the parties to said proceedings were given a full and complete hearing; that the findings, conclusions, and interpretations in said report entered April 13, 1951, were and are fully supported and justified by the submissions made in said proceedings as aforesaid, and that in making said report it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition called to its attention on behalf of the parties to said proceeding by their respective counsel.

The Commission further alleges that said report was not made or entered either arbitrarily or unjustly, or contrary to law; that in making said report the Commission did not exceed the authority conferred upon it by law, and the Commission denies each of and all the allegations to the contrary contained in the amended complaint.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the amended complaint, in so far as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said report.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall direct, and hereby prays that said amended complaint be dismissed.

Interstate Commerce Commission, by (S.) Allen Crenshaw, Associate General Counsel.

(S.) Edward M. Reidy — General Counsel, of [fol. 31] Counsel. Certificate of Service (Omitted in Printing)

[fol. 32] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA TO FROZEN FOOD EXPRESS' AMENDED COMPLAINT—Filed August 16, 1954

Comes now the United States of America, a defendant, and for answer to the amended complaint filed herein admits, denies and avers as follows:

I

Answering the allegations contained in paragraphs I and II the United States admits the same.

II

Answering the first and second sentences of the allegations contained in paragraph III, the United States of America neither admits nor denies the same, since it has no knowledge of such.

Answering the third sentence contained in paragraph III, the United States admits the same.

Answering the fourth sentence of paragraph III, the United States avers that the several named agricultural commodities are either manufactured (non-exempt) or non-manufactured (exempt) as contemplated by Sec. 203(b) (6) of the Interstate Commerce Act (49 U. S. C. § 303(b) (6)), as follows:

(1) Slaughtered cattle and fresh meat are non-manufactured or come under the category of live-stock;

(2) Meat products are manufactured;

(3) Frozen whole shelled eggs are manufactured;

(4) Dried egg powder is manufactured;

[fol. 33] (5) Dried egg yolks are manufactured;

(6) Cottage cheese is manufactured;

(7) Cream cheese is manufactured;

(8) Clean rice is manufactured;

(9) Rice beans and polished rice are manufactured;

(10) Pasteurized milk is non-manufactured;

(11) Fresh cut-up vegetables in cellophane bags are a manufactured product;

(12) Fresh vegetables, washed, cleaned and packaged in cellophane bags or boxes are non-manufactured;

(13) Fruits and vegetables (quick frozen) are manufactured;

(14) Shelled peanuts are non-manufactured;

(15) Peanuts shelled ground are manufactured;

(16) Killed and picked poultry (not drawn) are non-manufactured;

(17) Rolled barley is manufactured;

(18) Butter is manufactured;

(19) Coffee ground or roasted is manufactured;

(20) Cottonseed meal is manufactured;

(21) Cottonseed hulls are non-manufactured;

(22) Beans, packaged, dried artificially or packed in small containers for retail trade are non-manufactured;

(23) Fruits and vegetables canned are manufactured;

(24) Dried fruits, dried mechanically or artificially are non-manufactured;

(25) Peaches peeled, pitted and placed in cold storage in unsealed containers are manufactured;

(26) Strawberries canned in syrup in unsealed containers and placed in cold storage are manufactured;

(27) Milk condensed is manufactured;

(28) Skimmed milk is non-manufactured;

(29) Buttermilk is manufactured;

[fol. 34] (30) Vitamin D and pasteurized milk are non-manufactured;

(31) Feathers are non-manufactured;

(32) Frozen meat is non-manufactured or comes under the category of livestock;

(33) Frozen dressed poultry is non-manufactured;

III

Answering the allegations contained in paragraph IV, the United States avers that the order of the Interstate Commerce Commission decided April 13, 1951 in the "Determination of exempted agricultural commodities," 52 M. C. C.; 511-566, holding the following to be exempt, is based on substantial evidence and valid:

(1) All products raised or produced on farms by tillage and cultivation of the soil (such as vegetables, fruits and nuts);

(2) Trees felled and those trimmed, cut to length, peeled, or split, crude resin, maple syrup, sap, bark, leaves, Christmas trees and greenery, and Spanish moss;

(3) Live poultry and bees;

(4) Commodities produced by ordinary livestock, live poultry and bees (such as milk, wool, eggs, and honey);

(5) Fruits, berries, and vegetables which remain in their natural state (but not frozen or quick frozen) including harvesting, washing, cleaning, sorting, grading, polishing, and the various other described non-manufacturing treatments accorded fresh fruits and vegetables;

- (6) Dried fruits, vegetables, dried naturally or artificially;
- (7) Whole wheat;
- (8) Rye;
- (9) Oats;
- (10) Forage, loose or baled hay, dehydrated hay, naturally or artificially dried hay;
- (11) Raw peanuts unshelled, and other nuts unshelled;
- [fol. 35] (12) Cotton in bales or in the seed, cottonseed, ginned cotton, flax fiber and flax seed;
- (13) Tobacco leaf, hops, castor beans;
- (14) Seeds;
- (15) Live chickens, turkeys, ducks, geese, squab, wool in the form sheared from the sheep;
- (16) Eggs in the shell, including oiled eggs;
- (17) Milk, cream, skim milk, standardized milk, pasteurized milk, homogenized milk and cream and Vitamin D milk and skim milk.

Further answering the United States alleges that the order of the Interstate Commerce Commission hereinbefore referred to holding that the following are not exempt is based on substantial evidence and valid:

- (1) Fruits, berries, and vegetables, viz. placed in hermetically sealed containers; frozen or quick frozen; shelled, sliced, shredded, or chopped up;
- (2) Seeds prepared for condiment use;
- (3) Dehulled rice and oats, and pearled barley;
- (4) Shelled eggs, frozen or dried eggs, frozen or dried egg yolks, and frozen or dried egg albumin;
- (5) Trees processed further than those felled, trimmed, cut to length, peeled or split;
- (6) Mint oil;
- (7) Meat products;
- (8) Chocolate milk; milk, cream, or skim milk which has been concentrated, dried, fermented, churned or curdled;
- (9) Syrup and sugar.

[fol. 36] And further answering the allegations contained in paragraph IV the United States avers that the findings of the Commission in the aforesaid order, holding that the following commodities are not exempt, are not based on substantial evidence contained in the record, and such findings being arbitrary, unreasonable and unjust are null and void:

- (1) Slaughtered meat animals and fresh meats;
- (2) Dressed and cut-up poultry, fresh or frozen;
- (3) Feathers;
- (4) Raw shelled peanuts and raw shelled nuts;
- (5) Hay chopped up fine;
- (6) Redried tobacco leaf;
- (7) Cottonseed hulls and linters;
- (8) Frozen cream, frozen skim milk and frozen milk;
- (9) Seeds which have been deawned, scarified or inoculated

IV

Further answering paragraph IV the United States alleges that there is no justiciable issue involving the following commodities enumerated in the plaintiff's complaint, since such commodities have been held to be exempted by the Interstate Commerce Commission:

- (1) Fresh vegetables, washed, cleaned and packaged in cellophane bags or boxes;
- (2) Beans, packaged, dried artificially or packed in small containers for retail trade;
- (3) Dried fruits, dried mechanically or artificially;
- (4) Pasteurized milk, skim milk or Vitamin D milk.

With respect to those commodities which the Interstate Commerce Commission in its assailed order found to be [fol. 37] non-exempted, but which defendant alleges are exempted, the Commission's findings should be enjoined and the order set aside.

All other findings contained in the order of the Interstate Commerce Commission which the defendant alleges are lawful should be sustained and the order pertaining to the same should be adjudged lawful and valid.

V

Answering paragraph V the United States avers that the complainant will not be deprived of the right granted to it under the laws of the United States if the Interstate Commerce Commission seeks to have enjoined the complainant's transportation of the commodities that the United States alleges are not exempted under the Interstate Commerce Act.

Wherefore the United States prays that that part of the order of the Interstate Commerce Commission that the defendant alleges to be lawful and valid be so declared by the court and that the portion of the order alleged by the defendant to be arbitrary, unjust and unlawful be enjoined and set aside.

The United States further prays that the court grant such other relief as is proper and equitable.

By the United States of America, (S.) James E. Kil-day.

Stanley N. Barnes, Assistant Attorney General.

(S.) Charles S. Sullivan, Jr., Special Assistants to the Attorney General.

Malcolm R. Wilkey, United States Attorney, Southern District of Texas.

[fols. 38-42] Certificate of Service—(omitted in Printing).

[fol. 43] IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

Civil Action No. 8285

FROZEN FOOD EXPRESS, PLAINTIFF, EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, INTERVENING PLAINTIFF,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

COMPLAINT OF INTERVENOR EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE U. S.—filed, Aug. 18, 1954

I

Intervening plaintiff, Ezra Taft Benson, Secretary of Agriculture of the United States (herein referred to as the Secretary), brings this complaint to suspend, enjoin, annul and set aside the order of the Interstate Commerce Commission (herein referred to as the Commission) entered on April 13, 1951, in a proceeding before the Commission entitled "MC-C-968, *Determination of Exempted Agricultural Commodities*", 52 M.C.C. 511, insofar as such order finds and concludes that the following commodities are not embraced by the terms "ordinary livestock" or agricultural commodities" as those terms are used in section 203(b)(6) of the Interstate Commerce Act (49 U.S.C. 1946 ed. 303(b)(6)):

- [fol. 44]
- (1) Slaughtered meat animals and fresh meats;
 - (2) Dressed and cut-up poultry, fresh or frozen;
 - (3) Feathers;
 - (4) Raw shelled peanuts and raw shelled nuts;
 - (5) Hay chopped up fine;
 - (6) Cotton linters and cottonseed hulls;
 - (7) Frozen cream, frozen skim milk, and frozen milk;
 - (8) Seeds which have been deawned, scarified or inoculated.

II

The jurisdiction of the Court is founded upon section 205 (g) of the Interstate Commerce Act (49 U.S.C. 1946 ed. 305 (g)), section 10 of the Administrative Procedure Act (5 U.S.C. 1946 ed. 1009), sections 1336, 1398, 2284, and 2321 to 2325, inclusive, of the Judicial Code (28 U.S.C. 1946 ed. Supp. IV 1336, 1398, 2284 and 2321-2325), and section 201 of the Agricultural Adjustment Act of 1938 (7 U.S.C. 1946 ed. 1291).

III

The United States of America is named as a statutory defendant pursuant to section 2322 of the Judicial Code (28 U.S.C. 1946 ed. Supp. IV 2322).

IV

The Commission is an administrative tribunal, created by the Act to Regulate Commerce approved February 4, 1887 (24 Stat. 383), with specifically vested powers and duties respecting interstate commerce under the said Act and the acts amendatory thereof and supplemental thereto, hereinafter referred to as the Interstate Commerce Act.

[fol. 45]

V

The administrative proceeding entitled "MC-C-968, *Determination of Exempted Agricultural Commodities*" was instituted by the Commission by its order dated June 21, 1948, a copy of which is attached hereto as Appendix A, and was an investigation into and concerning the meaning of the words "agricultural commodities (not including manufactured products thereof)" as used in section 203 (b)(6) of the Interstate Commerce Act (49 U.S.C. 1946 ed. 303 (b)(6)). Hearings were held before a Hearing Examiner of the Commission in Washington, D. C., in November 1948 and in Atlanta, Georgia, in January 1949. Briefs were filed by various parties. In his recommended report served July 29, 1949, the Hearing Examiner found, *inter alia*, that with the exception of slaughtered meat animals and fresh meats, all of the commodities specified in paragraph I hereof are agricultural commodities within the meaning of section 203 (b)(6) of the Interstate Commerce

Act. The Hearing Examiner made no finding whatsoever in regard to slaughtered meat animals and fresh meats. A copy of the Hearing Examiner's recommended report is attached hereto as Appendix B. Oral argument was heard by the entire Commission. In its report and order dated April 13, 1951, a copy of which is attached hereto as Appendix C, the Commission found and concluded that slaughtered meat animals are not embraced by the term "ordinary livestock" and that the other commodities specified in paragraph I hereof are not "agricultural commodities" within the meaning of section 203 (b) (6) of the Interstate Commerce Act (49 U.S.C. 1946 ed. 303 (b) (6)).

VI

The Secretary alleges that the aforesaid report and order of the Commission in MC-C-968, *Determination of Exempted Agricultural Commodities*, 52 M.C.C. 511, insofar as it finds and concludes that the commodities specified [fol. 46] in paragraph I hereof are neither ordinary livestock nor agricultural commodities, as aforesaid, is unsupported by adequate findings or substantial evidence, is contrary to the weight of the evidence of record, is based upon errors of law, fails to give effect to the legislative purpose of section 203 (b) (6) of the Interstate Commerce Act, exceeds the statutory authority of the Commission, and is unlawful, arbitrary, capricious and null and void.

Wherefore, the Secretary prays that the Court suspend, enjoin, annul and set aside the report and order of the Commission in MC-C-968, *Determination of Exempted Agricultural Commodities*, 52 M.C.C. 511, dated April 13, 1951, insofar as it finds and concludes that the commodities specified in paragraph I hereof are not embraced by the terms "ordinary livestock" or "agricultural commodities" as used in section 203 (b) (6) of the Interstate Commerce Act (49 U.S.C. ed. 303 (b) (6)), and that the Secretary have such other and further relief in the premises as in equity may appertain and as may be deemed by the Court fit and proper.

Respectfully submitted, by the direction of Ezra Taft Benson, Secretary of Agriculture of the United States. (S.) Charles W. Bucy, Associate Solicitor.

(S.) Walter D. Matson, Harry Ross, Jr., Attorneys,
Office of the Solicitor, United States Department
of Agriculture, Washington 25, D. C.

[fols. 47-48] Certificate of Service (omitted in printing).

[fols. 49-99] APPENDIX "A" TO COMPLAINT

Corrected Order

At a General Session of the Interstate Commerce
Commission, held at its office in Washington, D. C., on the
21st day of June, A. D. 1948.

No: MC-C968

Determination of Exempted Agricultural Commodities

Petitions filed in No. MC-107669 by the Secretary of Agriculture and Atlantic Commission Co., Inc., and others being under consideration; and good cause appearing therefor;

It is ordered, That an investigation be, and it is hereby, instituted by the Commission, on its own motion, into and concerning the meaning of the words "agricultural commodities (not including manufactured products thereof)" as used in section 203 (b) (6) of the Interstate Commerce Act.

It is further ordered, That this proceeding be assigned for hearing at a time and place to be fixed later; but that in compliance with the request of the Secretary of Agriculture, the date of the hearing shall be at least 90 days from the date hereof.

And it is further ordered, That notice of this order shall be given to the public by depositing copies hereof in the office of the Secretary of the Commission, Washington, D. C. and by filing with the Division of the Federal Register.

By the Commission, W. P. Bartel, Secretary. (Seal.)

[fol. 100] APPENDIX "C" TO COMPLAINT
INTERSTATE COMMERCE COMMISSION

No. MC-C-968¹

Determination of Exempted Agricultural Commodities

Submitted December 8, 1949. Decided April 13, 1951

1. In No. MC-C-968, meaning of words "agricultural commodities (not including manufactured products thereof)" as used in section 203(b)(6) of the Interstate Commerce Act, determined and certain commodities falling within such term, specified. Proceeding discontinued.

2. In No. MC-107669, upon further hearing, findings in prior report, 47 M. C. C. 597, reversed. Applicant found to have failed to establish that he is willing and able to perform the service proposed or to conform to the requirements of the Interstate Commerce Act and our rules and regulations thereunder. Application denied.

Appearances as shown in prior report in No. MC-107669 and in addition: *James Julian Weinstein* and *John D. Clark* for interveners.

Appearances in No. MC-C-968²: *Charles W. Bucy*, *James K. Knudson*, and *Henry A. Cockrum* for the Secretary of Agriculture of the United States.

A. A. Carmichael, *McDonald Gallion*, *Haygood Paterson*, *Walter L. Randolph*, *Gordon Persons*, *C. C. (Jack) Owens*, *Jimmy Hitchcock*, *George O. Miller, Jr.*, and *J. G. Bruce* for the State of Alabama and others.

H. K. Thatcher, *Ike Murry*, and *G. E. Williams* for the State of Arkansas.

M. W. Wells, *Lewis W. Petteway*, *Ed T. Hammil*, and *Gordon Stedman* for the Florida Railroad and Public Utilities Commission and others.

Claude Shaw for the State of Georgia.

Sam H. Flint for the Georgia Public Service Commission.

¹ This report also embraces No. MC-107669, *Norman E. Harwood Contract Carrier Application*.

² A number of parties who entered appearances in No. MC-C-968 also appeared in No. MC-107669.

W. E. Anderson and *J. J. Arceneaux* for the Louisiana Department of Agriculture and Immigration.

Walter E. Piper for Department of Agriculture of Commonwealth of Massachusetts.

James T. Kendall and *Greek L. Rice* for the State of Mississippi.

Elmer W. Cart for the North Dakota Public Service Commission and others.

J. Roy Jones for the State of South Carolina.

C. E. Logwood for the Public Service Commission of South Carolina.

[fol. 101] *L. M. Walker, Jr.*, for the State of Virginia and others.

H. G. Wagner for the Port of Norfolk (Va.) Authority.

J. L. Manton for Virginia Agricultural Extension Service and others.

William C. Seibert for the State Corporation Commission of Virginia.

W. J. Augello, Ed. P. Byars, Percy T. Brewbaker, Frederick E. Brown, Kathryn P. Casey, Max Chambers, Ralph E. Covey, Harry E. Dixon, C. B. Funderburk, Nunzio Giambalvo, Kelly E. Griffith, Eli Grubic, E. L. Hart, L. James Harmanson, Jr., Delos L. James, J. R. Kettler, Donald Kirkpatrick, Wilber LaRoe, Jr., Karl D. Loos, C. E. McDaniel, Percy H. Russell, Jr., Robert H. Roland, J. T. Schatt, Durwood Seals, William R. Settgas, L. W. Sherwood, Raymond E. Steele, Howard L. Stier, A. C. Thompson, John R. Van Arnum, L. J. Whitbeck, Richard P. White, Edgar L. Williams and *E. M. Yarbrough* for shippers, growers, and others.

Harry E. Boot, Edgar S. Idol, and Albert B. Rosenbaum for American Trucking Associations, Inc.

H. Scott Byerly for National Council of Private Motor Truck Owners, Inc.

Joseph H. Blackshear, Reuben G. Crimm, R. W. Cronon, Milton E. Diehl, Charles F. Dodrill, James J. Doherty, A. R. Eldred, Wentworth E. Griffin, Frank B. Hand, Jr., Theodor Herman, Harry McChesney, Jr., David G. Macdonald, F. X. Masterson, James W. Nisbet, John R. Norris, Franklin R. Overmyer, Lee Reeder, Charles P. Reynolds, Maynard F. Robinson, Glenn W. Stephens, Clarence D. Todd, Jr., and

Marie Tissier for various motor carriers, motor carrier associations, and rail carriers.

Report of the Commission on Oral Argument

By the Commission:

Exceptions to the order recommended by the examiner were filed by the rail carriers and Railway Express Agency, Inc., and a number of motor carriers and motor carrier associations, to which the Secretary of Agriculture, the State of Alabama, and numerous agricultural interests and others replied; and the parties were heard in oral argument. Our conclusions differ somewhat from those recommended.

The title proceeding is an investigation instituted on our own motion into and concerning the meaning of the term "agricultural commodities (not including manufactured products thereof)" as used in section 203(b)(6) of the Interstate Commerce Act. Upon consideration of petitions filed by the Secretary of Agriculture, and jointly by the [fol. 102] Atlantic Commission Co., Inc., and others by a concurrent order, we reopened No. MC-107669, *Harwood Contract Carrier Application*, 47 M. C. C. 597, hereinafter called the *Harwood* case, for further hearing on a consolidated record with the investigation proceeding.

Representatives of the United States Department of Agriculture and a large number of States, agricultural marketing associations, farmer organizations, shippers, growers, and other interested parties appeared and submitted evidence. A number of rail and motor carriers also appeared but only one presented any affirmative evidence. Neither the applicant in the *Harwood* case nor anyone in his behalf appeared at the further hearing in that proceeding.

At the oral argument, the rail carriers requested that the record in No. MC-89207, *Monark Egg Corporation Contract Carrier Application*, 52 M. C. C. 576, be incorporated into the investigation proceeding by reference. No objection was made to this request, but a ruling thereon was reserved until a study of that record could be made. The request is based on the fact that there is a more extensive record in that proceeding concerning the practices in the industry in-

the desired salad dressing is added. The spinach is washed, cleaned, and packed ready for cooking. The spinach and salads are packed by the shipper in cellophane bags and boxes. After preparation, and pending shipment, the commodities are placed in coolers at the shipper's plant. In concluding that these commodities do not fall within the partial exemption of section 203 (b) (6), division 5 said:

[fol. 104] The washing, cleaning, and packaging of fresh vegetables in cellophane bags, or boxes for sale to consumers place such commodities in the ordinary channels of commerce and remove them from the class of unmanufactured agricultural commodities falling within the partial exemption of section 203 (b) (6). * * *. Applicant accordingly requires authority to perform the transportation of such commodities. Since the fresh fruits and vegetables will presumably be transported in the same vehicles with the above non-exempt commodities, authority to perform such transportation is likewise required.

It is this finding which the agricultural interests vigorously assail. They contend that such a restricted interpretation is clearly contrary to the intent of Congress and that the extension of this principle to other commodities would have a devastating effect on farmers and agricultural interests as a whole.

The decision was predicated on the "channel of commerce" principle, which was first announced in *Monark Egg Corp., Contract Carrier Application*, 44 M. C. C. 15 (prior report 26 M. C. C. 615), hereinafter referred to as the second report. In that report, division 5, at pages 18 and 19, said:

The legislative history indicates that the benefits of the exemption were intended for the farmer by affording relief in the transportation of his products to the point where they first enter the ordinary channels of commerce.

Based on this premise, division 5 concluded that peanuts, after delivery by the farmer to the shelling plant and upon removal of the shell by the latter, had entered the ordinary

channels of commerce and "the operation performed upon it at that point removes it from the class of unmanufactured agricultural commodities which was intended to be designated by the section here under consideration." It also concluded that poultry, which is usually commercially killed and dressed by meat-packing companies or by special poultry packers and subsequently transported under refrigeration, can no longer be considered an unmanufactured agricultural commodity.

[fol. 105] The cited cases and others in which division 5 has had occasion to determine the question of whether or not certain commodities were within the partial exemption in question and the pertinent conclusions reached in each instance are reflected in parts I (a) and II (a) of the appendix hereto. Also, listed in that appendix, under parts I (b), II (b), and III thereof, are commodities which our Bureau of Motor Carriers, in response to inquiries, has held informally⁴ to be within or without the partial exemption as the case may be.

Interpretation of the Term "Agricultural Commodities (Not Including Manufactured Products Thereof)"

The term "agricultural commodities (not including manufactured products thereof)" is not defined in the act, nor has this term, as such, been interpreted by the Courts, so far as we can determine. The fundamental rule of statutory construction is first to find and bring into effect the actual meaning and intention of the law-making body and to consider the language used in the statute in its natural and ordinary sense. Where the language is wholly clear and free from ambiguity, it must be applied as it is written. But here the language used is not free from ambiguity, in that it is not definite as to what is meant by "agricultural commodities", or as to what constitutes unmanufactured products thereof. In defining the meaning of the term used in the exemption, resort therefore must be

⁴ These informal opinions are expressed in part in the form of an administrative ruling or in letter memoranda. The substance of such opinions were introduced in evidence in exhibit form by the U. S. Department of Agriculture.

made to the legislative history, and if necessary, to other sources.

Legislative History. As passed by the Senate on April 17, 1935, Senate bill 1629, which was the bill ultimately enacted as the Motor Carrier Act, 1935 (now Part II of the Interstate Commerce Act), contained no provision of the nature of the present section 203(b)(6). The bill as reported to the House of Representatives, however, con-[fol. 106] tained a provision (inserted by the House Committee on Interstate and Foreign Commerce) which exempted from most provisions of the act—

Motor vehicles used exclusively in carrying livestock or *unprocessed* agricultural products. [Emphasis supplied.]

In response to a question concerning the object of this partial exemption, a committee member replied: ⁵

The object was to help the farmer and keep him out of any regulation whatsoever insofar as handling unprocessed agricultural products or livestock on the farm.

The meaning of the term "unprocessed agricultural products" was the subject of considerable debate on the floor of the House and was explained in part by several members of the House Committee on Interstate and Foreign Commerce. For instance, one committee member stated that the term embraced "anything that has not been canned or manufactured or processed;" and that it would include cream and milk. He further agreed that the term "includes all farm commodities produced upon any farm in the raw state ready for market", and stated that "on the whole, that is the way the Commission will interpret it and undoubtedly, the Courts will give the same interpretation to it".⁶

⁵ Page 12213, Congressional Record, Part II, Vol. 79, 74th Congress, First Session.

⁶ Page 12205, Congressional Record, Part II, Vol. 79, 74th Congress, First Session.

In order to meet the views of many members of the House the chairman of the sub-committee in charge of the legislation moved to strike the phrase "unprocessed agricultural products" and in lieu thereof to substitute the words "agricultural commodities (not including manufactured products thereof)". He explained the purpose of the proposed amendment as follows:⁷

[fol. 107] Mr. Chairman, we have heard a good deal of discussion this afternoon as to what is a ~~a~~-processed agricultural product, whether that would include *pasteurized* milk or ginned cotton. It was not the intent of the Committee that it should include those products. Therefore, to meet the views of many Members we thought we would strike out the word "unprocessed" and make it apply only to *manufactured products*. [Emphasis supplied]

The sponsor of this amendment further explained that cotton in bales and cotton seed transported from gins to market or to a public warehouse would come under the partial exemption whereas they might not otherwise come within the exemption "since ginning is sometimes considered as processing."⁸ The amendment was thereupon adopted. The bill was further amended in certain other respects not material to the matter immediately under discussion. Upon the return of the bill to the Senate, the Chairman of the Senate Committee on Interstate Commerce explained the House amendments generally as liberalizing the provisions of the measure, and stated that they improved the bill and met with his approval.⁹ The House amendments were thereupon concurred in by the Senate.

The history of the legislation is not wholly clear as to the intent of Congress, except that the partial exemption

⁷ Page 12220, Congressional Record, Part II, Vol. 79, 74th Congress, First Session.

⁸ Page 12220, Congressional Record, Part II, Vol. 79, 74th Congress, First Session.

⁹ Page 12460, Congressional Record, Part II, Vol. 79, 74th Congress, First Session.

was to aid the farmer. That the term includes in addition to the raw farm products, commodities that have been treated or processed to an extent beyond such raw products state, is made plain by the explanation of the chairman of the sub-committee in charge of the legislation that the exemption was intended to cover pasteurized milk and ginned cotton. It is thus apparent that the Congress intended the exemption to extend to commodities produced by the farmer in the natural state and to a limited extent those further treated or processed. In the absence of any declaration by Congress, as to what other commodities were to be embraced within the term, it is necessary to look to other sources.

[fol. 108] There is little doubt but that the Congress intended that the term should be construed in its plain, usual, and commonly accepted sense. The task is not an easy one. Some of the parties urge that it should be construed as a whole, following the "channel of commerce" principle, so that once a commodity has left its original source and has been transported beyond such source, it becomes a manufactured product. Others contend for a more liberal interpretation depending upon their interests in the matter.

To arrive at the true meaning of the term, it is necessary to define separately its two component parts, and then use such definitions in combination to make determinations as to the applicability of the partial exemption. Accordingly, we will determine first the scope of the commodities embraced within "agricultural" commodities, and second, the basis for ascertaining what constitutes manufactured products of agricultural commodities, giving at the same time further consideration to the "channel of commerce" principle.

Agricultural commodities—The word "agriculture" has been variously defined, both by the courts and by the lexicographers. In its limited sense it means tillage or cultivation of the soil and the raising of crops. But in a broader sense, and as commonly understood, it means the science and art of production of plants and animals useful to man, including to a variable extent the preparation of these products for man's use and their disposal by marketing or otherwise.

Funk and Wagnalls New Standard Dictionary defines "agriculture" as follows:

[fol. 109] The cultivation of the soil for food products or any other useful or valuable growths of the field or garden; tillage; husbandry; also, by extension, farming, including any industry practiced by a cultivator of the soil in connection with such cultivation, as forestry, fruit-raising, breeding and rearing of livestock, dairying, market-gardening, etc.

Farming refers to the cultivation of considerable portions of land and the raising of the courser crops; gardening is the close cultivation of a small area for small fruits, flowers, vegetables, etc., and while it may be done on a farm is yet a distinct industry. Gardening in general, kitchen-gardening, the cultivation of vegetables, etc., for the household, market-gardening, the raising of the same for sale, floriculture, the culture of flowers, and horticulture, the culture of fruits, flowers, or vegetables, are all departments of agriculture but not strictly nor ordinarily of farming.

The definition of "agriculture" in standard law texts are of the same general import. In 3 Corpus Juris Secundum 365-366, it is stated:

In its more common and appropriate sense, it has been said, the word "agriculture" is used to signify that species of cultivation which is intended to raise grain and other field crops for man and beast; it has been said to signify especially cultivation with the plow and in large areas to raise food for man and beast; in a broader sense, "agriculture" is the science or art of the production of plants and animals useful to man; in its general sense "agriculture" includes gardening or horticulture, fruit growing, and storage and marketing. The word covers all things ordinarily done by the farmer and his servants incidental to carrying on his branch of industry; including, to a variable extent, the preparation of products from these for man's use.

A similar definition is found in 2 American Jurisprudence 395, as follows:

Agriculture, in the broad and commonly accepted sense, may be defined as the science or art of cultivating the soil and its fruits, especially in large areas or fields, and the rearing, feeding and management of livestock thereon, including every process and step necessary and incident to the completion of products therefrom for consumption or market and the incidental turning of them to account. The term is broader in meaning than "farming"; and while it includes the preparation of soil, the planting of seeds, the raising and harvesting of crops, and all their incidents, it also includes gardening, horticulture, viticulture, dairying, poultry, and bee raising, and more recently "ranching". It refers to the field or farm, with all its wants, [fol. 110] appointments, and products, as horticulture refers to the garden, with its less important, though varied, products.

Funk and Wagnalls New Standard Dictionary defines "horticulture" as follows:

That department of the science of agriculture which relates to the cultivation of gardens or orchards, including the growing of vegetables, fruits, flowers, and ornamental shrubs and trees.

In this broad use "agriculture" has been held to include farming, horticulture, forestry, and dairying. See *State v. Christensen*, 137 Pac. (2d) 512, and cases therein cited, *Walling v. Rocklin*, 132 Fed. (2d) 3; *Northern Cedar Co. v. French*, 230 Pac. 837; *Meendez v. John*, 76 Pac. (2d) 1163; *Forsythe v. Village of Cooksville*, 190 N.E. 421; *Sancho v. Bowie*, 93 Fed. (2d) 323; and *Stuart v. Kleck*, 129 Fed. (2d) 400.

The examiner concluded that the word "agricultural" is ordinarily understood to include farming, horticulture, forestry, dairying, and livestock and poultry raising, and the production and marketing of various products of livestock and poultry; and that a like interpretation is here warranted in respect of that term as used in section 203

(b)(6). Certain of the exceptants contend that the examiner's interpretation of the term is too broad, and is erroneous from the standpoint of statutory construction. They urge that a strict construction is proper since the term in question is embodied in an exemption to legislation which is remedial. They offer no substitute for the interpretation mentioned, although one of them refers, for the purposes of comparison, to the foregoing definition of the word "agriculture" found in 3 Corpus Juris Secundum pages 365-366, which does not refer to forestry or dairying. [fol. 111] In using the words "agricultural commodities", it is apparent that Congress did not have in mind only "that species of cultivation which is intended to raise grain and other field crops for man and beast." This is indicated by the legislative history which leaves no doubt that Congress intended that commodities produced in "farming and dairying" were to be included within its meaning. As the transportation of livestock (later amended to "ordinary livestock") was the subject of a separate exemption, it is apparent that the term "agricultural commodities" was not used in a sense broad enough to include livestock. Giving due consideration to the foregoing, and the frequent references in the history of the exemption to the "farm", "farm commodities", etc., we are impelled to conclude that Congress had in mind generally the commonly understood meaning of the word "farm", so as to embrace the edible products usually grown by the farmer and those commodities generally considered to be the products of "farming" or attached to the farm. Therefore, such commodities as nursery stock, flowers and bulbs are not considered as products of "farming" as that term is generally used. However, for reasons hereinafter stated, we think that certain forest products are "agricultural commodities". We conclude that the term "agricultural commodities" as used in section 203 (b)(6) embraces all products raised or produced on farms by tillage and cultivation of the soil, (such as vegetables, fruits and nuts); forest products; live poultry and bees; and commodities produced by ordinary livestock, live poultry and bees (such as milk, wool, eggs and honey).

Manufactured products. Having found the scope of the commodities embraced within "agricultural commodities",

we come next to that portion of the term, "(not including manufactured products thereof)". In determining what are or are not manufactured products, we must first ascertain the meaning of the word "manufactured".

[fol. 112] The word "manufacture" has frequently been construed by the courts, but different meanings have been given the word depending upon the rule of construction to be followed—whether liberal or strict—the context in which the word was used, and the intent of Congress. The rule of strict interpretation was applied in *Hartranft v. Wiegmann*, 121 U. S. 609. The question there before the Court was whether certain articles were manufactures of shells subject to the payment of duties under Federal tariff laws or unmanufactured shells exempt from duties under another provision of the tariff laws. The shells were imported from abroad and had been subjected to a duty under a tariff imposing a 35 per cent ad valorem tax on manufactures of shells. The outer layer of the shells had been removed by acid and the second layer had been ground off. Mottoes were etched on some of the shells. In either condition they were sold as ornaments or for other purposes. In rendering judgment for the importer the Court said:

We are of the opinion that the shells in question here were not manufactured, and were not manufactures of shells, within the sense of the statute * * * but were in the free list. They were still shells. They had not been manufactured into a new and different article, having a distinctive name, character, or use from that of a shell. The application of labor to an article, either by hand or by mechanism, does not make the article necessarily a "manufactured article" within the meaning of that term as used in the tariff laws.

The Court, however, referred to the rule applicable in tariff cases that "if the question were one of doubt, the doubt should be resolved in favor of the importer as duties are never imposed on the citizen upon vague or doubtful interpretations."

In *Allen v. Smith*, 173 U. S. 389, the Court had before it the question of who was entitled to a bounty given by statute "to the producer of sugar"—the grower of sugar cane or

the manufacturer of sugar. In deciding that the latter was the producer, the Court at pages 399 and 400 said:

"The word 'producer' does not differ essentially in its legal aspects from the word 'manufacturer', except that it is more commonly used to denote a person who raises agricultural crops and puts them in a condition [fol. 113] for the market. In the case of sugar a process of strict manufacture is also involved in converting the cane into its final product. In a number of cases arising in this court under the revenue laws, it is said that the word 'manufacture' is ordinarily used to denote an article upon the material of which labor has been expended to make the finished product. That such product is often the result of several processes, each one of which is a separate and distinct manufacture, and usually receives a separate name; or, as stated in *Tide Water Oil Co. v. United States*, 171 U. S. 210, 216: 'Raw materials may be and often are subjected to successive processes of manufacture, each one of which is complete in itself, and several of which may be required to make the final product'.

In a later case, *Fruit Growers, Inc., v. Brodex Co.*, 283 U. S. 1, involving the validity of a patented process, the issue before the Court was whether an orange, the rind of which had become impregnated with borax, through immersion in a solution, and thereby rendered resistant to blue mold decay, constituted a "manufacture" or manufactured article, within the meaning of a designated Federal statute. In reversing the Circuit Court of Appeals and holding that it was not a "manufacture", the Court at pages 11 and 12 said:

"Manufacture", as well defined by the Century Dictionary, is "the production of articles for use from raw or prepared materials by giving to these materials new forms, qualities, properties, or combinations, whether by hand-labor or by machinery". Also "anything made for use from raw or prepared materials".

Addition of borax to the rind of natural fruit does not produce from the raw materials an article for use which possess a new or distinctive form, quality, or

property. The added substance only protects the natural article against deterioration by inhibiting development of extraneous spores upon the rind. There is no change in the name, appearance, or general character of the fruit. It remains a fresh orange fit only for the same beneficial uses as theretofore.

At this point; it is appropriate to point out that several of the exceptants in support of their contentions that a number of the items classified by the examiner as unmanufactured agricultural commodities are in fact manufactured products, rely upon cases involving an interpretation of the [fol. 114] term "agricultural labor" or similar terms. With respect to cases of this type, the court in *State v. Christensen, supra*, said:

There seems to be considerable confusion in the decisions concerning the interpretation of the term "agricultural labor", or like terms, as used in the exemption clauses of unemployment compensation, fair labor standards, workmen's compensation and taxation cases. It seems to us that some of the confusion has arisen in attempting to apply certain features found to be the determining factor in some cases as the criteria in other situations, instead of looking more to the main purpose of the operation.

The court went on to point out typical instances of the kind referred to above. No good purpose would be served in discussing cases of this type, as the partial exemption relates to "agricultural commodities (not including manufactured products thereof)" and is not concerned with occupational classifications.

The definition of the word "manufacture", adopted by the Court in *Fruit Growers, Inc. v. Brodex Co., supra*, in our opinion is appropriate for application here, and we conclude that the portion of the term "(not including manufactured products thereof)" means agricultural commodities in their natural state and those which, as a result of treating or processing, have not acquired new forms, qualities, properties or combinations.

The foregoing definitions of the two portions of the term

follow substantially those promulgated and utilized by the examiner. Their adoption here makes necessary further discussion of the "channel of commerce" principle, which most of the exceptants insist should be followed in determining the applicability of partial exemption.

Channel of Commerce Principle—As indicated, the principal contention of most of the exceptants is that the "channel of commerce" principle should be the controlling factor [fol. 115] in determining whether or not an agricultural commodity is within the partial exemption. The examiner did not apply the principle. Instead, he applied substantially the same definitions of the term as approved above to decide whether a particular commodity was manufactured, or not manufactured, using in his determinations the evidence adduced with respect to the processing of such commodities. He concluded that the place where the commodities were processed (but not manufactured), whether or not on the farm or in a commercial establishment, was not controlling of the classification of the commodity.

Most of the exceptants vigorously contend that the legislative history of the act clearly shows that the purpose of the partial exemption, to the extent here considered, was to aid only the farmer and not commercial establishments; that it should be so construed as to restrict exempt vehicles to operations from the farm to the primary market or the point at which the farmer disposes of his products; and that once the commodities in question have entered the ordinary channels of commerce, the partial exemption should be inapplicable. They urge that division 5 in its second report in the *Monark Egg Case*, properly construed the partial exemption when, at page 18, it said:

The policy reflected in the exemption here under consideration is in accord with the general policy to favor and promote the interests of agriculture. The problem confronting Congress at the time of the adoption of the exemption was to relieve transportation of the essential products of agriculture from some of the incidents of regulation, and yet preserve the general purpose of the necessary regulation of transportation by motor vehicle. The legislative history indicates that the benefits of the exemption were intended for the farmer by

affording relief in the transportation of his products to the points where they first enter the ordinary channels of commerce.

[fol. 116] Several of the exceptants assert that unless the partial exemption is so construed, they will suffer irreparable damage through the loss to operators of exempt vehicles of traffic which they are authorized to transport and upon which they largely depend.

In connection with the foregoing, the American Trucking Association, Inc., requests that the following rule be adopted:

Any commodity, taken from the field, or from its original source, and transported beyond the confines of such source, becomes a manufactured product when it receives any treatment or processing after such first transportation.

Rephants do not question the rule of statutory construction that exemptions contained in remedial legislation should be strictly construed, but they urge that exceptants seek unduly to restrict the application of the partial exemption. They contend there is no basis for the argument advanced by most of the exceptants that the partial exemption should cease to attach when an unmanufactured agricultural commodity enters the ordinary channels of commerce. In support of such contention they point out that in the second report in the *Monark Egg Case*, division 5 also found that only fish and shell fish dead or alive, as taken from the water, were within the purview of the term "fish (including shell fish)" as used in section 203 (b) (6); but that following the decision of the court in *Interstate Commerce Commission v. Love*, 172 F. 2d 224, we reopened the *Monark Egg Case* in respect of the last-mentioned finding, and in our report on further consideration¹⁰ therein 49 M. C. C. 693,

¹⁰ By order entered February 13, 1950, No. MC-89207, Monark Egg Corporation Contract Carrier Application, was reopened for oral argument in respect of the matters considered in our report on further consideration, 49 M. C. C. 693.

reversed the prior decision of the division in that respect and found that the term "fish (including shell fish)" includes frozen, quick frozen, and unfrozen fish in the various [fol. 117] forms in which it is shipped, excluding fish in hermetically sealed containers or fish otherwise treated for preserving. In the circumstances, it is argued that no weight may now be given to the prior restrictive decision of the division in its second report in the *Monark Egg Case*, in resolving the issues in the instant proceedings.

The partial exemption contained in section 203 (b) (6) is directed to the motor vehicles, not to the transportation of "agricultural commodities (not including manufactured products thereof)." There is no limitation as to the points from and to which the motor vehicles may be operated. Although the object of the partial exemption as originally framed was to aid the farmer in marketing his products, the substitution of the present language for the words "unprocessed agricultural products" clearly resulted in a broadening of the exemption. That this is so was made plain by the chairman of the subcommittee sponsoring the amendment when he stated that pasteurized milk and ginned cotton were intended to come within the partial exemption. He also indicated that cottonseed would fall within the exemption. It must be assumed that Congress was familiar with the practices obtaining in the industry incidental to the marketing of these and other agricultural commodities. As hereinafter shown, the uncontradicted evidence in this respect is that the pasteurization, among other processing, and bottling of milk for sale to consumers, is customarily done at dairies in the larger cities throughout the country, and that the bulk of the cotton seed is sold by the farmer to the ginner. In the light of these practices and the clear intent of Congress that pasteurized milk was to be included in the partial exemption, irrespective of the fact that the milk was processed after entering the ordinary channels of [fol. 118] commerce, or that the cotton seed was sold to the ginner, it is difficult to conclude that Congress intended that other agricultural commodities, processed (but not manufactured) or packaged for consumer use, regardless of ownership, should be treated differently. Moreover, to hold that the place at which the commodities are predominantly

processed or packaged is controlling of the applicability of the partial exemption would, in many instances, prevent the movement by exempt vehicle of items processed or packaged by farmers themselves, a result obviously not intended by Congress.

Certain of the exceptants contend that by amending the original phraseology of the partial exemption, Congress intended to broaden the exemption only to the extent of including therein pasteurized milk, ginned cotton, and cottonseed. If such a result had been intended Congress could simply have added the three named commodities after the words "unprocessed agricultural products". We think the commodities mentioned were intended to be illustrative of the types of processing permissible under the partial exemption as now phrased.

It is significant that in other sub-paragraphs of section 203 (b), Congress specifically limited the operations of exempt motor vehicles. For example, section 203 (b) (1) applies to "motor vehicles employed solely in transporting school children and teachers to and from school;" section 203 (b) (3) relates to "motor vehicles owned or operated by or on behalf of hotels and used exclusively for the transportation of hotel patrons between hotels and local railroad or other common carrier stations"; section 203 (b) (4a) applies to "motor vehicles controlled and operated by any farmer when used in the transportation of his agricultural [fol. 119] commodities * * *"; and section 203 (b) (5) concerns "motor vehicles controlled and operated by a co-operative association * * *". In light of the foregoing limitations imposed upon the operations of the particular exempt motor vehicles, and the failure of Congress similarly to limit exempt motor vehicles carrying "agricultural commodities (not including manufactured products thereof)", the argument advanced by exceptants that the partial exemption of section 203 (b) (6) applies only to exempt motor vehicles carrying unmanufactured agricultural commodities from the farm to the point where they enter the ordinary channels of commerce is without merit.

Certain of the certificated motor carriers, exceptants herein, transport under appropriate authority such commodities as shelled raw peanuts and dressed poultry, heretofore found by division 5 to be without the partial exemp-

tion. They fear that a reversal of these prior decisions would result in irreparable damage to them through the loss of a considerable portion of their traffic to operators of exempt motor vehicles, and contend that by its failure to amend section 203 (b) (6), at least since the issuance of the second report in the *Monark Egg* case, Congress by implication must be considered to have acquiesced in the interpretation placed thereon by division 5. In the *Love* case, a similar contention made by us in respect of the interpretation by division 5 of the term "fish (including shell fish)" as used in section 203 (b) (6), was rejected by the court. We are here concerned only with the meaning of the words "agricultural commodities (not including manufactured products thereof)" as used in section 203 (b) (6).

Inconvenience or hardships, if any, that result from following a proper interpretation of the statute can be relieved only by Congress. We conclude that the "channel of commerce" principle is not appropriate for use in determining the applicability of the partial exemption.

[fol. 120]

General

The foregoing definitions of the component parts of the term in question furnish a basis by which a determination may be made of what commodities, processed or unprocessed, fall within the partial exemption. As pointed out by certain of the agricultural interests, however, any definition of the term would be susceptible to varying interpretations and would be impractical of application for administration or other purposes. They assert that as a result of constructions and interpretations of the term by division 5 and by our Bureau of Motor carriers, and because of confusion which exists in the agricultural and motor carrier industry as to what agricultural commodities come within the purview of the term and as to what type of processing may convert the agricultural commodity to a manufactured product, the Secretary of Agriculture and others, believe that something more than a mere definition of the term is necessary. In order that the growers, processors, packers, carriers, and others, might be fully apprised of the commodities which fall within the partial exemption, evidence was pre-

sen'ed pertaining to the various practices and methods employed generally in the agricultural industry in connection with the preparation for market of numerous agricultural commodities. In the circumstances, we shall proceed to consider, as did the examiner, the commodities and groups of commodities to determine whether individual commodities or classes of commodities are agricultural commodities falling within the partial exemption on the basis of the foregoing definitions and of the evidence adduced relating to the various commodities.

It has been suggested that a master list of the numerous agricultural commodities, found to be within the partial exemption, be prepared. Although the listing of such commodities would be desirable, it is not believed feasible here, as evidence was not presented in respect of all agricultural [fol. 121] commodities. Our findings herein will include those agricultural commodities which we have determined to be unmanufactured, either by groups, classes, or individually. Such classification, when considered in connection with the various treatments or processes discussed herein, may also serve as a guide for determining whether or not most, if not all, of the commodities not specifically considered herein would or would not fall within the partial exemption.

Evidence of the character described was presented by a number of employees of the United States Department, of Agriculture, hereinafter called the Department, including 11 scientists, by two professors of Ohio State University, by officials or agencies of nine States,¹¹ by State and regional producers and shippers,¹² by various associations of pro-

¹¹ Alabama, Florida, Georgia, Louisiana, Maryland, Mississippi, North Dakota, South Carolina, and Virginia.

¹² Alabama Farm Bureau Federation, Growers and Shippers League of Florida, Winter Garden (Fla.) Citrus Growers Association, American Fruit Growers Association, Georgia Fruit Exchange, Maryland Vegetable Growers Association, State Grange for South Carolina, and several individual growers and companies.

ducers and shippers,¹³ and by an unregulated motor carrier. Evidence also was offered by the National Grange and others relative to the history and background of the partial exemption, and a number of resolutions adopted by various organizations, opposing the *Harwood* case principle, were introduced. Each Department scientist presented evidence in respect of a separate phase of agriculture in which, for the most part, he has specialized and engaged in research [fol. 122] work for many years. In each instance an exhibit was received listing all or the more important basic agricultural commodities discussed by the particular witness, the processes or treatments accorded each in preparing the commodity for market, and a list of those commodities or products which each scientist considered to be non-manufactured or manufactured; as the case may be. Each scientist is the author of numerous technical papers and popular writings in his particular field. The evidence offered by these persons presents an overall and, in most instances, a complete picture of the steps taken or treatments accorded the various groups of commodities preparatory to reaching the consumer markets, and will be discussed in some detail. Evidence offered by the growers, shippers, and others, which for the most part is corroborative, will be discussed only to the extent that some new matter is covered. Thus for the first time we have presented to us a portrayal of the various treatments or processes which the many different agricultural commodities customarily undergo in preparing them for market, the marketing practices, and other pertinent phases of the industry.

¹³Vegetable Growers Association of America, National League of Wholesale Fresh Fruit and Vegetable Distributors, Texas Cottonseed Crushers Association, American Association of Nurserymen, International Apple Association, National Association of Commissioners, Secretaries, and Directors of Agriculture, American Farm Bureau Federation, Florida Fruit and Vegetable Association, Society of American Florists, Cotton Producers Association, Southeastern Peanut Association of Albany, Ga., Cooperative Growers' Association of Burlington County, N.J., and Apalachian Apple Service.

Vegetables and Fruits

We shall discuss first the evidence presented in respect of the vegetable group. Fifty-eight vegetables are embraced in this group. The various over-all treatments considered by the Department scientist to be non-manufacturing are: harvesting, trimming, husking, wiping or brushing, washing (with or without chemicals), drying (not dehydrated), waxing, polishing, sorting, sizing, grading, tying, cutting, curing, wrapping, icing, refrigerating, precooling, ripening, fumigating, packaging, crating, or boxing, bagging, peeling, shredding, chopping, and slicing. Not every vegetable listed, however, undergoes all of these treatments. For example, [fol. 123] celery is harvested, dried, fumigated, packaged or bagged; and the process "curing" applies only to garlic, onions, sweet potatoes, yams, and winter squash. As the meaning of most of the named treatments or terms are readily understood, the testimony in this respect was limited to an explanation of those terms not commonly understood or as to which some further comment was required. The precooling of vegetables is performed by ice, water, or cold air in order to remove field heat from the commodity. very little washing of crop is done in the field now. Ordinarily washing facilities are installed at some convenient spot not far distant. Sometimes chemicals are added to the water in order to prevent infection of the vegetables; but the chemicals are said not to change the basic character of the washed vegetable. Peeling, shredding, chopping, and slicing are generally factory treatments, and, in the opinion of the scientist, when done as steps in canning, freezing, dehydrating or some other manufacturing process, constitute the items manufactured products.

Fumigation involves the application of a chemical vapor for the control of insects. For example, beans and peas in storage have to be fumigated frequently to control weevils; also certain quarantine laws require fumigation.

Machinery is used in many of the foregoing treatments, even at the harvesting stage. Such machinery is located both on farms and in commercial establishments. With the exception of the sizing of peas and the peeling, shredding, chopping, or slicing of the individual vegetables, when done as a step in canning, quick-freezing, dehydrating or other

such manufacturing processes, the scientist does not consider that any of the steps or treatments enumerated above cause the particular commodity to become a manufactured product. He expressed the opinion, however, that the mix- [fol. 124] ing of chopped-up vegetables, such as those sold under the trade name of Veg-mix, results in a manufactured product.

Other treatments specified, such as salting (brining), crushing, extracting, straining or filtering, blanching (scalding), canning,¹⁴ freezing (quick-freeze process), dehydrating, evaporating, grinding (dry), fermenting, and splitting (peas), in the opinion of this scientist, render the affected items manufactured products. Vegetables which are quick frozen or dehydrated are always previously blanched or scalded (precooked) in order to inactivate the enzymes and thus "kill the plant life." In such instances, he considers the resultant articles to be a manufactured product. He is of the same opinion in respect of instances where ascorbic acid is added to the commodity.

The various fruits as to which another scientist offered evidence, include: oranges, grapefruit, tangerines, lemons, limes, berries,¹⁵ avocados, mangos, dates, currants, persimmons, olives, apples, pears, quinces, peaches, plums, prunes, cherries, grapes, apricots, nectarines, pineapples, melons, and watermelons. Certain tropical or sub-tropical fruits¹⁶ are contained elsewhere in his exhibit, but the treatments accorded them are not shown. The fruits itemized above are treated or processed in substantially the same manner as vegetables with the addition of such treatments (regarded by this scientist as non-manufacturing), [fol. 125] as polishing, adding color, gassing, and heating

¹⁴ When used as an inclusive term to identify the entire "canning" process; the can or container does not, in the witness' opinion, make the commodity manufactures.

¹⁵ Includes strawberries, blackberries, cranberries, gooseberries, loganberries, blueberries, and any kind of wild berries that may be harvested for marketing in commercial channels.

¹⁶ Citron, kumquats, bananas, figs, guavas, loquats, sapodillas, and pomegranates.

(for insect control). As in the case of vegetables, all of the named treatments are not accorded each kind of fruit listed. By way of illustration, all of the fruits are harvested, sorted, sized, graded, and packaged, but only grapes and pineapples are trimmed, only grapefruit are "heated" for insect control, and only lemons are cured. Apples and pears are the fruits commonly washed with chemicals to remove residue from spraying; the other fruit generally are washed only for the purpose of cleaning.

In the opinion of this scientist the mixing of several kinds of sliced or chopped-up fruits and packaging in a cellophane bag—even if identified to the trade as a salad mix—would not be a manufactured product, as the basic nature of the ingredients has not been changed. With the exceptions noted above, he does not regard the application of any of the named treatments as changing the fruit into a manufactured product. Generally speaking, all of the processes or treatments listed as non-manufacturing are performed at the orchards, on the farms, or in the immediate vicinity, perhaps in a centralized packing house. They are done at the point of production prior to delivery for sale to the retailer or ultimate consumer.

The scientist considers a product to be manufactured if it is drastically or markedly changed in composition or quality. In arriving at this conclusion, he also has taken into consideration the historical background "of where and for what the treatment is applied". Treatments considered by him to be such as to convert the fruit into a manufactured product are: salting (brining), fermenting, crushing, extracting, straining, or filtering, centrifuging, canning, freezing (quick freeze process), dehydrating and evaporating (applicable only to apples), and grinding. He regards dehydrated apples, but not other dehydrated fruits, as a [fol. 126] manufactured product. Such conclusion is predicated on the fact that the apples are peeled, cored, sliced, and treated with sulphur solution or gas spray, and dried with artificial heat, for the most part in commercial establishments. Other fruits are customarily dried naturally or artificially on the farm. The quick-freeze process as applied to fruits generally involves the addition of ingredients, such as sugar or syrup. If ingredients other than the fruit

are added, the frozen mixture is considered by him to be a manufactured product, otherwise not.

The testimony presented by other individuals and representatives of a number of organizations regarding the practices in the vegetable and fruit industry is substantially similar to that outlined above. Considerable additional evidence, however, was presented by other persons relative to the necessity for certain of the treatments mentioned above and for packaging.

Brushing, washing, waxing, and similar treatments are said to be necessary to remove all or most of the decay-producing organisms from the surface of the produce. Fresh fruits and vegetables, which are living plant organisms, are usually harvested before reaching full maturity. Therefore, it is of vital importance in the preparation for market that conditions be created and maintained to retard maturity, and simultaneously prevent excessive deterioration, shriveling, wilting, and bacterial decay. One of the measures is to place the produce in containers to facilitate better handling and prevent bruising. Plastic transparent over-wraps aid in protecting the produce from contamination with micro-organisms throughout the channels of distribution. At the same time most plastic over-wraps are permeable to gases, thus allowing the produce to breathe. Another protective measure is refrigeration which serves to reduce the activity of decay-producing organisms and [fol. 127] to retard the rate of growth in fruits and vegetables. These persons, generally, are of the opinion that so long as the fruit and vegetables are living organisms, they are agricultural commodities and not manufactured products thereof. Whenever life is extinguished, however, it is said that the fruit or vegetable is no longer a living commodity. In this connection, one person explained that in the case of dried fruit, for example, the organisms are not dead—they are inhibited; but in the case of dehydrated carrots there is no plant life. He also expressed the view that chopped or shredded vegetables are still living organisms and hence would fall in the category of an unmanufactured product.

There is a growing demand on the part of the public that fresh produce be properly prepared for consumer use, and

southern agricultural interests are constantly endeavoring to get farmers to follow the best marketing practices. There is a greater demand, for example, for the grading and defuzzing of peaches; the waxing of cucumbers and melons; and the grading and washing of potatoes and other commodities. Commodities so processed generally bring a better price on the market than similar commodities not so treated. In this connection, the marketing board of one southern State has found that if the produce is not properly prepared, there would be no sale.

A professor of marketing at Ohio State University, whose field of specialization, since 1919, embraces marketing facilities, transportation, grading, standardization, packaging, prices, costs of marketing, and more recently the packaging and marketing in consumer units, testified as to packaging practices. He stresses the importance of packaging fresh fruits and vegetables to insure delivery in good condition from producer to consumer. Containers for such produce have improved from time to time and many new and improved types have appeared in recent years. Now [fol. 128] in use are containers made of wood, fibre, paper, and plastics. Tough transport films are widely employed in consumer unit packages. For example, cranberries are now packed at shipping points largely in 1-pound cellophane bags. In connection with the prepackaging of spinach, the vegetable is brought to the packing plant in baskets which are emptied on to a moving belt, the unfit parts being removed by hand. The spinach is then washed, following which the excess moisture is removed by centrifugal force. It is then placed by hand into cellophane or similar-type transparent bags and check-weighed. The bags are, then, sealed by heat or other means and placed into cartons.

Packaging in wooden boxes has long been customary on the farm, in the packing house and at many other steps in the marketing process. Corrugated paperboard is now being used to manufacture boxes in which apples are shipped to market. The "Friday" tray, a container made of paperboard dividers to keep each fruit in a separate compartment, is now being used in the apple trade.

Packaging is said to be done only for the broad merchandising purposes of protection, convenience, standardization,

and identification, irrespective of the size or type of container used or the places where the packaging occurs. Consumer packaging commenced some time prior to 1935 in connection with such farm produce as apples, potatoes, dry onions, citrus fruits, and even tomatoes, and spinach. The present trend is to extend the practice to other highly perishable products. The basic reasons for this trend are: (1) that smaller units handle easier; (2) they help to reduce damage and losses; (3) they permit reduced shipping weights and volume; (4) they are suitable for branded and labeled self-service; and (5) they improve sanitation and help to prolong freshness and palatability of the products. [fol. 129] Consumer packaging in small, moisture-proof containers is now being widely employed. It is done to some extent on the farm, but most of it takes place after arrival at terminal markets. Substantial progress, however, is being made in the direction of "moving this job back to the farm."

Other evidence pertaining to local packaging practices was presented by representatives of the various States, State agencies, associations of growers, shippers, and others. Briefly, citrus fruits are handled from the field to a farmers' cooperative packing house,¹⁷ in the same State where, after the fruit is washed, polished, sized, graded, and color added, it is placed in several different types of containers. A consumer-type package such as used for oranges has been in use for 25 years. Since 1934 growers and shippers of celery have tied "celery hearts in bunches," and wrapped them in parchment or cellophane for shipping. Today celery is marketed in various sized crates, in cellophane or parchment wrapped bundles; and in boxes with cellophane windows (one to three bunches in a box) as a consumer package. Corn is marketed fresh in bags, crates, and to some extent in consumer-size boxes, including cellophane window boxes. The latter-type packages contain husked corn.

Experimental prepackaging is being conducted on a farm in Florida by an association of growers in order to determine the feasibility of prepackaging at the farm. Last

¹⁷ The cooperative does not buy the fruit but it is said to remain its property until it reaches the terminal market.

year this plant prepackaged for consumer use—the containers were cardboard trays over-wrapped with cellophane—sweet corn, broccoli, cauliflower, and tomatoes. The prepackaged items were shipped directly to chain stores, wholesalers, brokers, and others by private carriers and exempt motor vehicles.

[fol. 130] A packer of fresh vegetables in Baltimore, Md., purchases vegetables in many different States. With respect to spinach, which is the principal item handled, the grower separates the leaves, but the packer performs the other processes, such as washing, etc., and packaging. Seventy-five percent of the spinach is placed in cellophane bags in the manner previously described. The outbound shipments of consumer-packaged spinach, which frequently moves in the same load with spinach packed in baskets, is transported in exempt motor vehicles. Spinach is produced in large volume in Virginia and is hauled to plants¹⁸ built in spinach producing areas, as for example, Norfolk, Va., where it is washed and packaged in cellophane bags or in bushel baskets. In the Norfolk area, the washing, trimming, and grading of spinach and certain other vegetables are customarily done by a majority of the large growers and by several county produce haulers. These processes, including packaging, are now being performed generally in the area of production as most growers regard their chances of obtaining equitable returns improved by so doing.

In the southern States, and in New Jersey most of the fruits and vegetables are packed in conventional-type containers on the farm or at nearby packing plants. Growers of blueberries, however, place the berries in pint containers overwrapped with cellophane. Strawberries also are packed in consumer-size containers. There is also some consumer-packing of corn and peaches in certain of these States. A major portion of the farm produce in these States moves initially from the farm to packing houses, farm cooperatives, or State markets located in the respective States in which the produce is grown.

[fol. 131] Apples generally in the various areas in which grown are placed in wooden bushel boxes or baskets as

¹⁸ Growers largely supply the capital necessary for the erection of these plants.

they are harvested. They are packed on the farm and in commercial packing plants. When they are washed, the natural wax on the apples is dissolved, and Nujol oil is now used largely in an attempt to restore the wax. The wax neutralizes gases given off by the apples, and in the absence of a wax coating, scald would appear. In the Pacific northwest each apple is wrapped separately to protect it, placed in uniform boxes, and then put in cold storage.

As early as 1910, to some extent apples were placed in consumer units (small cardboard containers) holding 8 to 10 apples. Numerous growers and shippers now package apples in 2- and 5-pound mesh bags or other small containers. Some experimental work is being performed with a consumer-size package made of cardboard with a cellophane window. Packaging of this type is done usually at terminal points.

Alabama has a State Market Board which was created to assist farmers in the growing and preparation of their products for market. Through this medium numerous plants have been established in this State to which the growers bring their fruits and vegetables and other products to be graded and prepared for market. Although Alabama does little consumer packaging at present, more and more emphasis is being placed on this practice and the State representative believes that this method of marketing will soon be on the increase.

The examiner concluded that fruits, berries, and vegetables which remain in their natural state (but not frozen or quick frozen), including vegetables shredded or chopped-up and mixed irrespective of the processing performed in preparing the commodities for any market or the manner in which packaged, so long as they are not placed in hermetically sealed containers, are unmanufactured agricultural commodities within the meaning of section 203 (b)(6). Certain of the exceptants contend that the examiner's finding in respect of (1) prepackaged, shredded vegetables and those chopped-up and mixed, and (2) vegetables, dried naturally, and fruits and berries dried naturally or artificially, is erroneous.

We think it clear that such treatments or operations as harvesting, washing, cleaning, sorting, grading, polishing, and the various other described non-manufacturing treat-

ments accorded fresh fruits and vegetables, other than those discussed below are not such as to constitute the items manufactured products of agricultural commodities. The commodities so treated are, when marketed, substantially the same as when harvested. With respect to sliced, shredded, and chopped-up fruits or vegetables the situation is different. The border-line nature of such items is clearly indicated by the fact that the scientists who appeared at the hearing are not in agreement as to the proper category, as between manufactured and unmanufactured, in which these products shall fall. In our opinion, these products have been so changed in form from the vegetables produced on the farm as to remove them from the category of unmanufactured agricultural commodities. And for reasons stated later herein, under the discussion of nuts, we conclude that shelled vegetables also are manufactured products.

As concerns dried fruits, these articles are customarily dried naturally on the farm and differ in composition from the fresh fruit only to the extent that a large portion of the water content is removed. No sound distinction can be made between the natural and artificial drying of most fruits as the resulting product is the same. We do not believe that under the foregoing definition of "manufacture" that dried fruits may properly be considered as falling in that classification. For similar reasons, the conclusion is justified that vegetables, dried naturally or artificially also are unmanufactured agricultural commodities. [fol. 133] Dehydrated vegetables, however, differ from those dried naturally in that the former are blanched or scalded prior to dehydrating, thus inactivating or killing the enzymes, and the vegetables are no longer living entities. Dehydrated vegetables therefore do not come within the exemption.

Although no one questions the examiner's conclusion that frozen or quick-frozen fruits and vegetables are manufactured products, in view of certain questions raised respecting other frozen commodities, some discussion of these items will be helpful. The quick freezing of fruits involves the addition of other ingredients, principally sugar or syrup. Since a "combination" results, it follows, in light of the foregoing definition of "manufacture" that quick-

frozen fruits are manufactured products. In the quick-freezing of vegetables, the commodities are customarily blanched or scalded prior to freezing, and sometimes ascorbic acid is added, thus enabling the product to be held in that condition until ready for use. In the circumstances, the frozen vegetables cannot be said to be in their natural state. We conclude that they too are manufactured products.

[fol. 134]

Cereal Group

The various cereals of importance grown in the United States are wheat, rye, oats, barley, flax, rice, buckwheat, corn (including maize), and sorghums. The treatments accorded wheat and rye are combining, harvesting, shocking, stacking, threshing, cleaning, and grinding. Buckwheat is harvested, shocked, threshed, and cleaned; and corn is harvested, shocked, husked, artificially dried, shelled, and ground. The other listed cereals are processed in the same manner as indicated for wheat and rye, except that oats and flax are not ground; barley is not cleaned; rice is not ground but is artificially dried; and sorghums, in addition to the other treatments listed for wheat, are headed and crushed.

The modern combine cuts off the heads of grain plants, threshes and cleans the grain, and pours the kernels directly into a conveyance of some kind for movement from the field to storage. Sometimes the kernels are placed in bags in the field. In the last few years, rice has usually been harvested with a combine before the grain is fully dry in the field. The universal practice in California now is to take the grain direct from the combine in the field to a drier where the moisture is brought down to safe levels before it goes to storage. Corn is husked mechanically and by hand. Although corn and rice are frequently dried by artificial means, this does not kill their viability if properly applied. Corn is shelled by a mechanical process on the farm and at local elevators. It has historically been common practice on the farm to grind much of the grain before it is fed to livestock, in order to make it more digestible, but none of the grain so ground moves in interstate or foreign commerce.

The scientist testifying with respect to the cereal group

does not consider that a mixture of the grains, even if ground together (provided no vitamins or other ingredient is added) would result in a manufactured product. Nor [fol. 135] does he believe that any of the other above-mentioned treatments or processes convert the items into manufactured products. He lists as unmanufactured agricultural commodities the following: whole or ground, wheat, rye, oats, barley, flax, corn, sorghums, rice, straw, corn and sorghum fodder, corn cobs, and stover.

Treatments described as converting the commodities into manufactured products are: dehulling, crushing, (flax), milling, making, brewing, distilling, pearling, extracting, popping, parboiling, rolling, or evaporating. The last-mentioned process applies only to sorghums; and only oats and rice are dehulled. Unlike wheat, in which the hull or chaff is removed in the threshing operation, the hulls of rice adhere tightly to the kernel after threshing and a separate, much more complicated, process is required to remove the hulls. The removal of the hulls, which is the first process in preparing rice for the milling operation, leaves what is usually called brown rice. White rice, regarded as a manufactured product, is obtained by a further processing referred to as a polishing operation, which removes the "brown" coat. When oats are used for making oatmeal or other products, the hulls are removed from the kernel. Pearling is a mechanical process of abrasion or rubbing by which the husk or chaff is removed from barley. Milling, considered by the scientist to be a manufactured process, is said to be distinguished from grinding, by reason of the fact that in the case of the former, the grain must be carefully tempered to get the right amount of moisture in the bran oats without giving it time to penetrate the center of the kernel. Milling is not just a grinding of a coarse grain; rather it is a much more technical process consisting of the breaking of the grain so that the outside bran may be separated from the endosperm which is ground into flour. The scientist considers the following to be manufactured products: flour, including meal, rolled oats and barley, [fol. 136] pearled barley, malt and malt liquor, distilled liquors, brewers grain, sorghum syrup, corn syrup, starch, rutkin (from buckwheat), popcorn, parboiled rice, breakfast cereals, linseed oil, and malted foods.

The examiner concluded that whole wheat, rye, and oats, including those dehulled, barley (including that pearled), flax, corn, sorghums, rice, shelled corn, sorghum fodder, and stover are unmanufactured agricultural commodities. Only the rail carriers except to this finding, contending that dehulled oats, dehulled rice and pearled barley are manufactured products of agricultural commodities for reasons substantially similar to those stated by the scientist. We agree with the scientist that dehulled oats and rice and pearled barley are manufactured products of agricultural commodities. The removal of the hulls or husks, which apparently is done preliminarily to a further manufacturing operation—probably at the same plant or in the vicinity thereof—changes the articles into manufactured products. We conclude that the questioned commodities are manufactured products of agricultural commodities. The conclusions of the examiner in respect of the cereal group are not otherwise questioned and except for a slight modification of the commodity descriptions to conform with the evidence, we deem them proper.

Forage Crops Group

Forage crops include the basic commodities alfalfa, soybeans, mungbeans, grasses, and other legumes such as vetches, field peas, clovers, lespedesias, and similar crops. The treatments accorded alfalfa, soybeans, and those crops designated as "other legumes" are harvesting, drying (field barn), chopping, dehydrating, baling, and ensiling. Additionally, the treatment "sprouting" applies to soybeans. Mungbeans are harvested, threshed, cleaned, inoculated, bagged, and sprouted.

[fol. 137] All of the forage crops used for feed generally are dried, either in the field or barn, prior to storage. Drying is necessary before the commodity can be marketed. Machinery is used for the chopping and dehydration of hay, the common term applied to the dried forage crop. Some dehydration is done on the farm, but the dehydrated hay does not appear to differ materially from hay dried naturally. The scientist, who presented evidence in respect of the above-captioned group, does not consider the products resulting from the described treatments to be manufactured. Based on the foregoing evidence, he believes the following

to be unmanufactured agricultural commodities: any forage loose or baled hay such as timothy, alfalfa, mixed, etc., chopped hay, and dehydrated chopped hay. Treatments which he deems to be manufacturing are crushing, fermenting, blanching, mill grinding, pelleting, extracting, and canning. Pelleting is the process by which certain of the named crops are dried, ground, and mixed with an adhesive and compressed into small pellets.

The examiner concluded that any forage loose or baled hay, chopped hay, and dehydrated chopped hay are unmanufactured agricultural commodities. The rail carriers contend that the chopping of hay is not necessary for the marketing of hay. No question is raised concerning the designation of naturally dried hay as an unmanufactured agricultural commodity; and there appears to be no difference in the hay, whether it is dried naturally or artificially. As stated, some dehydrating is performed on the farm. It does not appear that dehydrated hay differs in any material respect from that dried naturally and we conclude that it is an unmanufactured product. But hay which is chopped up fine must be regarded as a manufactured product in light of the approved definition. We conclude that forage and hay, whether naturally or artificially dried are unmanufactured agricultural commodities.

[fol. 138] 9 *Nut and Peanut Group*

The basic agricultural commodities considered in this group are: almonds, chestnuts, filberts, pecans, walnuts, tung nuts, pistachio nuts, and peanuts. The treatments accorded pecans and walnuts are harvesting, hulling, drying, cleaning, polishing, bleaching, grading, sorting, coloring, packaging, refrigerating, and shelling. Similar treatments, with the exceptions hereinafter noted, are given the following commodities: almonds, except polishing and coloring; chestnuts, except polishing, bleaching, and coloring; filberts, except coloring; tung nuts, except polishing, bleaching, grading, sorting, and coloring; pistachio nuts, except shelling; and peanuts, except hulling and coloring. Additionally, peanuts have to be dug, stacked, and picked.

Peanut vines with roots and adhering nuts are stacked in the field for the purpose of drying. Various other treat-

ments accorded peanuts, as hereinafter described, are said to be substantially the same for other nuts. After the peanuts are removed from the vine it is sometimes necessary to dry them further in order to reduce the moisture content. Usually this is done by air drying at the point of production. The nuts are then cleaned and usually sold to the sheller, who removes the shells in a machine operation. Peanuts are also sold in the shell to warehousemen, cooperatives, and others. The shelling plants are usually located in the immediate area of production. Only one variety of peanut is sold to the retail trade in the shell. This species is produced in only one area and the volume of peanuts that move in an unshelled condition to the principal markets is less than 10 percent of the total production. All of the Spanish peanuts, which are grown in the southeastern and southwestern sections of this country, are marketed by the shelling plants without shells. More than 90 per cent of all peanuts produced are used in the manufacture of peanut oil, peanut butter, or roasted to be packaged as salted peanuts or to be used as an ingredient of confectionery and bakery products. The principal purpose of shelling prior to shipment to plants where other products are made is to reduce the shipping space required and to make for more convenient handling.

The peanut kernel, after shelling, is encased in a fine brown membrane which is removed by blanching. Prior to blanching, the peanut is a living entity, and if planted will grow. After blanching, however, it is no longer a living entity. In the opinion of the scientist, who testified in respect of the nut group, neither the removal of the outer shell of the peanut or the other nuts, nor the treatments prior to shelling, render the article a manufactured product. Similarly, he regards any treatment of imported nuts such as Brazil, cashew, and cocoanuts, up to and including shelling, as not changing the nuts from an agricultural commodity. In his view the shell of a nut, like the hull of a cottonseed, is a by-product of treatments designed to obtain, in the case of cottonseed, the seed itself, and, in the peanut, the kernels encased by the shell. The raw shelled peanuts do not become useful, except where used

for seed,¹⁹ until they have been further processed after leaving the shelling plant. Unlike peanuts, which move from the shelling plant to various manufacturers, the other nuts named are used largely as direct foods, and except as indicated below they are not usually otherwise manufactured. The various nuts are considered by the scientist to be manufactured if they are blanched, roasted, ground or pressed, or if extraction is involved, as in the case of tung nuts. Additionally, the grinding of shells is deemed to be manufacturing.

The scientist believes that the following items are unmanufactured agricultural commodities: almonds, black walnuts, and filberts in the shuck or husk, in the shell, and [fol. 140] shelled fresh;²⁰ Brazil nuts, cashew nuts, and chestnuts in the shell and shelled fresh; cocoanuts, in the husk and in the shell; copra; English walnuts, in the husk, in the shell, and shelled; hickory nuts, in the shell; pecans, in the shell and shelled; pistachio nuts, in the husk and in the shell, fresh; and raw peanuts, in the shell and shelled. He regards as manufactured products any of the nuts which are canned, blanched, salted, or roasted.

The examiner concluded that raw peanuts, shelled or unshelled, and other nuts, shelled or unshelled, to which nothing has been added, are unmanufactured agricultural commodities. In addition to the contentions generally stated heretofore, exceptants contend that the shelling involves the use of expensive equipment and is the first step in a manufacturing process; and that the shelled nut, which does not resemble the nut in the shell, is therefore a manufactured product. Certain of the repliants argue that whether or not expensive equipment is used is not a proper criterion for determining whether a commodity is manufactured; that the shelling is only a preparatory treatment to shipping to manufacturers; and that the mere removal

¹⁹ Farmers either purchase the kernel from the shelling plant or shell their own peanuts for seed purposes.

²⁰ The term "fresh" as here used includes nuts that have been cured with or without artificial heat that may have been stored in their natural state or shelled, but which have not been cooked, blanched, salted, or ground.

of the shells from peanuts and other nuts does not constitute manufacture.

In *Interstate Commerce Commission v. Weldon*, 90 Fed. Supp. 873, we sought to enjoin the defendant Weldon from transporting raw shelled peanuts in interstate or foreign commerce for compensation without a certificate. Weldon contended that he did not require authority to engage in such transportation as the raw shelled peanuts are agricultural commodities within the meaning of section 203 (b) (6). [fol. 141] The court described the elaborate machinery and processing involved in the shelling operation and held that the shelling changed the peanut into a manufactured product. In light of the above definition of the term in question, we conclude that raw shelled peanuts are not an agricultural commodity within the meaning of section 203 (b) (6). For similar reasons, a like conclusion is reached in respect of other shelled nuts. There is no question that the other treatments described as non-manufacturing are such as to remove the commodities from the approved definition.

Fiber Crop Group

The basic agricultural commodities comprising the fiber crops are cotton lint and linters, cottonseed, ramie or China grass, flax fiber, flax seed and hemp. Cotton is picked by hand and to some extent by machinery. It is then taken to a gin where the seeds are separated from the cotton. Although the grower usually retains ownership of the ginned cotton, the bulk of the cottonseed generally is retained by the ginner in payment for the ginning. The cotton is next baled and frequently compressed to save shipping space. The ginner sells the cottonseed to oil mills, where small particles of lint are removed by the same process as that used in the initial ginning. Cotton linters are used in the making of mattresses, spookless powder, rayons, cellulose, and other articles. Next the hulls, which are used largely for feed on the farm, are removed from the seeds and the remainder of the seed or kernel is pressed and oil is extracted. The "cake" remaining is ground into meal and is used as an ingredient in mixed feeds. None of the several persons who submitted evidence with respect to fiber crops, considers such operations as harvesting, ginning, baling,

or compressing as converting the cotton lint and linters to manufactured products.

There are two types of flax, one produced for the seed with a limited use as fiber, and the other produced as a fiber crop. Flax fiber is used in the manufacture of paper and other items. Hemp produces fiber used for making rope. The various operations or treatments accorded the named basic commodities, which the Department scientist [fol. 142] regards as non-manufacturing are harvesting, ginning, scutching—a mechanical process for cleaning fibers—and baling. All of such processes are said to be necessary in order for the farmer to dispose of the commodities. Machinery is necessary for all such operations, except for minor variations which are or may be done by hand. The spinning, weaving, or finishing (bleaching or dyeing) of the cotton lint or linters and the various fibers, and the crushing of cottonseed for oil, are considered to be manufacturing operations. The scientist regards as unmanufactured agricultural commodities the following: cotton lint and linters, cottonseed, ramie fiber, flax fiber, flaxseed, and hemp fiber. He deems other products, such as cotton yarn, cottonseed meal, ramie yarn, and hemp rope, to be manufactured products. He also believes cottonseed hulls to be a manufactured product since they do not constitute a raw material from which other products are manufactured. Representatives of a cotton producers' association take an opposite view, pointing out that the hulls are used largely for feed on the farm.

The examiner concluded that cotton lint and linters, cottonseed, cottonseed hulls, ramie fiber, flax fiber, flaxseed and hemp fiber, are unmanufactured agricultural commodities. Congress clearly indicated that ginned cotton and cottonseed were to come within the partial exemption. The lint is separated from the seeds in the ginning process and later baled. We conclude that cotton in bales or in the seed, and cottonseed are agricultural commodities within the meaning of the act. A different conclusion is reached, however, in respect of cotton linters and cottonseed hulls. The linters are not in their natural state, and the cottonseed hulls are a by-product of a manufacturing operation, namely the extraction of oil from cottonseed. We conclude that cotton linters and cottonseed hulls are manufactured products.

[fol. 143] With respect to ramie fiber and hemp fiber, the scientist compares the processing thereof to the ginning and baling of cotton, in that the ginning and the baling of these fibers is necessary in order for the farmer to dispose of them. In the circumstances, and since these fibers are in their natural or raw state, we conclude that they are unmanufactured agricultural commodities. No exception is taken to the examiner's finding in respect of flax fiber and flaxseed. No change occurs in these commodities as a result of the previously described non-manufacturing treatments, and we conclude that they are unmanufactured agricultural commodities.

[fol. 144] Tobacco and Special Crop Group

The basic agricultural commodities in the above-captioned group considered by the scientist testifying with respect thereto, and the treatments, regarded by him as non-manufacturing, accorded each commodity, are:

Tobacco leaf—picking, cutting, field drying, barn drying, baling, stripping, sorting and redrying.

Hops—picking, cutting, barn or kiln drying, and baling.

Mint oil (crude)—cutting of the mint plant, field drying, and crude oil extraction.

Castor Beans—picking, barn or kiln drying, and threshing or combining.

The above-described processing of tobacco, with the exception of redrying, is performed on the farm. In "farm drying" tobacco, the commodity is left in the field for a day or so until part of the water content is removed and the leaf is wilted. This is done largely to facilitate handling. The tobacco leaf is then removed into a barn where it remains until dried naturally. In some instances heat is applied to accelerate drying. When the tobacco leaf is dried it is shipped loose or in bunches. Cigar-type tobacco is harvested by cutting the entire stalk and after drying the leaves are pulled from the stalk and usually baled. Redrying is a method of standardizing the moisture content of the tobacco and is never done on the farm. It is usually performed at a central assembly point. In this process the

tobacco is run through a redrying plant where the moisture is removed by mechanical means and a certain amount of moisture is thereafter added to the extent necessary for packing. Although the scientist regards the redrying of tobacco as a non-manufacturing treatment, as will be noted hereinafter, he classifies the product, namely, "redried hogshead packed leaf" as a manufactured product. His [fol. 145] conclusion is based on the fact that the product "is not any longer tobacco leaf." Other treatments accorded tobacco leaf and regarded by the scientist as manufacturing, are blending, stemming, aging, and fermentation.

Mint oil is oil that is volatilized usually from peppermint or spearmint plants, and is condensed by lowering the temperature to ordinary air temperature conditions. The oil is volatilized by the application of steam. The mint plants as such are not the marketable commodity; rather the oil is the marketed item. Ordinarily the mint oil is extracted on the farm.

The agricultural commodities considered by this scientist to be unmanufactured are: Loose leaf tobacco, cigar tobacco, leaf (baled), baled hops, crude mint oil, and castor beans. He deems the following to be manufactured products: Any redried hogshead packed leaf; case packed or fermented leaf; hop oil or lupuline; blended, redistilled or fractionized mint oil; and castor oil, castor cake, and castor meal.

The examiner concluded that tobacco leaf, redried tobacco leaf, hops, and castor beans are unmanufactured agricultural commodities, and that mint oil is a manufactured product. Certain of the exceptants contend that it was error to so classify redried tobacco leaf because such conclusion is contrary to the evidence and to the applicable law. They argue that the redrying process preserves an otherwise perishable commodity and that the natural tobacco leaf is materially altered thereby. The question of whether or not redried leaf tobacco is an unmanufactured agricultural commodity undoubtedly is a close one. But we are impelled to the conclusion that the characteristics of the dried [fol. 146] tobacco leaf have been altered to such an extent as to remove the resulting product from the category of an unmanufactured agricultural commodity. No exception is taken to the other agricultural commodities classified by the examiner as unmanufactured, and we agree therewith.

Seeds

Several of the scientists presented evidence relative to the processing of various types of seeds. The treatments applied in the processing of vegetable seeds are threshing, cleaning, picking, and blanching. In addition to threshing and cleaning, seeds of the forage crops, such as alfalfa, red clover, white clover, etc., are fumigated, inoculated, deawned, and scarified. Safflower seed, and mustard seed are picked and threshed; and sunflower seeds are picked, bared or kiln dried, and threshed. The term "picking" involves the removal of defective seeds or of foreign matter from dried seeds. Inoculating, which is generally done on the farm, refers to the treatment of seed with cultures of nitrogen-fixing bacteria prior to planting. Deawning is a process by which the adhering portions of the plant are removed from the seed. Scarifying consists of a treatment that scratches or wounds the seed coat, and improves the germination of certain types of seeds. The two processes last described are customarily performed by commercial seed handlers. Seeds of the forage crops are bagged in paper, burlap, and other types of containers, but not in small consumer-size packages. The other seeds are placed in small packages for consumer use, as well as in larger packages. None of the foregoing treatments is deemed by the scientists to alter materially the natural seeds and they are of the view that the seeds remain unmanufactured agricultural commodities.

[fol. 147]. Further processing of the seeds, such as the extraction of oil from safflower and sunflower seeds, admittedly constitutes the resulting articles manufactured products. Boxed mustard seed, such as prepared for condiment use, also is regarded as a manufactured product, as the characteristics of the seed have been changed by blanching or sterilizing. This seed, if planted, will not grow.

The examiner concluded that seeds, including those ready for planting or packaged for consumer use (except mustard seed or other seeds prepared for condiment use), are unmanufactured agricultural commodities. One of the experts contends that "seeds packaged for consumer use" are manufactured products of agricultural commodities. In our opinion, seeds which have been deawned or scarified,

as well as those which are prepared for condiment use (but not those seeds which have been inoculated) have undergone such a degree of processing that they have been changed from a raw product of the farm to a finished or manufactured article. We conclude that such seeds are manufactured products of agricultural commodities.

Poultry and Livestock Groups

Poultry Group.—The basic commodities comprising the poultry group are chickens, turkeys, ducks, geese, squabs, feathers and eggs. The various treatments accorded chickens preparatory to marketing are: killing, scalding, picking, drying, waxing, pinning, singeing, washing, cooling, grading, eviscerating, cutting up, packing, freezing, and storing. The same treatments with the exception of drying and waxing, apply to turkeys, and with the exception of [fol. 148], scalding, drying, and waxing, ducks and geese undergo the same treatment as those applied to chickens. Squab are killed, picked, washed, cooled, graded, eviscerated, packed, frozen, and stored.

The killing of chickens and turkeys is accomplished in the main by wholesalers, but the practice of killing on the farm is said to be on the increase, particularly in commercial producing areas. In the larger plants, the fowls are killed by machinery. Scalding is usually effected by dipping the poultry into large tanks of hot water and dragging the fowls through the tank by means of an overhead chain; or it may be done by subjecting the poultry to a series of hot water sprays. Picking is done both by machinery and by hand. Some hand picking is usually necessary in order to remove pin feathers and hair, although this may be accomplished by the application of hot wax; when the wax method is used, it is necessary to dry the fowl before applying the wax. After removal of the wax the fowls are cooled by appropriate means, graded, and packed in barrels or crates and covered with ice for shipment. In some instances water-proof paper is placed in the barrels and always when crates are used. In many instances the various treatments described are rendered at plants owned and operated by farm cooperatives. Turkeys and chickens are sometimes wrapped in cellophane for marketing, thus preventing evaporation.

The practice of cutting up poultry into different parts for the consumer trade is increasing and is done on the farm to some extent.

Producers of ducks on Long Island, N. Y., are organized and carry on all of the marketing operations including the freezing and storage of such fowl. The method of removing feathers from ducks and geese differs somewhat from that of chickens because the feathers of the former are saved for other uses. Accordingly, particular pains are taken to keep the feathers clean and dry.

[fol. 149] The scientist testifying with respect to this group does not consider any of the above-described treatments or practices, including freezing, to be manufacturing. He pointed out that the freezing of poultry by the quick-freeze method or otherwise, does not change the nature of the poultry in any way except to harden it. When thawed out, it remains a fresh fowl. Freezing merely enables the fowl to be kept for a long period. Such treatments as smoking, cooking, and canning, however, are said to cause the fowl to become a manufactured product. In the smoking process, some type of curing liquid is added, and the bird is actually cooked and therefore, is a manufactured product.

Feathers are collected, washed, graded, dried, stored, salted, and packaged. Most feathers originate in poultry killing plants but there are many poultry farmers who do their own killing and they are beginning to accumulate more feathers. Feathers treated in the manner described are not deemed by the scientist to be a manufactured product as no change in the commodity has occurred. Additionally, feathers (including hackles, down, quills, and fiber), of different density are separated by means of an air floatation process. Chicken down and fiber are obtained by application of this process to ground-up feathers. Because of the grinding process, these items are considered by the scientist to be manufactured products. But down from ducks or geese is obtained merely by means of the floatation process and hence is regarded by him as an unmanufactured agricultural commodity.

Eggs are collected, washed, grade, oiled, stored, and packaged. Considerable evidence respecting the oiling of

eggs was presented by two Department scientists and by a representative of a motor carrier. The oiling of eggs [fol. 150] merely involves the dipping of the egg into a colorless, odorless, and tasteless mineral oil, the object being to preserve the original quality of the egg. According to the scientists, this method is used widely by farmers. Through experimentation, one of the scientists has found that oil-dipped eggs, after being in storage at temperatures ranging from 29 to 32 degrees Fahrenheit, compare favorably with fresh eggs. In this connection, he pointed out that a high percentage of deterioration of a fresh egg occurs during the first 24 hours after the egg is laid and that unless it is stopped by oiling or some refrigerating process, the egg after 48 hours will "look poorer" than one in storage 3 months. Neither of the scientists regards the oiling of eggs as affecting the character of the egg, nor are the other treatments considered such as to alter the eggs in any respect.

The breaking and freezing, or the dehydration of eggs are said to convert the eggs to manufactured products. The breaking of the shell, which is done by hand, makes the egg much more perishable. Although the breaking is regarded as one step in a manufacturing process, standing alone, it is said not to constitute manufacturing. Whole eggs (shells removed), or the separated yolks and albumin, are quick frozen at commercial plants and stored; they are also dehydrated at similar points. The scientist testifying in respect of this phase of processing expressed the view that the frozen and dehydrated eggs are manufactured products.

Summarizing, the scientists conclude that the following items are unmanufactured agricultural commodities: chickens and turkeys, New York dressed drawn, eviscerated, cut-up, or frozen; ducks and geese, New York dressed, eviscerated, cut-up or frozen; squab, dressed, eviscerated, or frozen; eggs, whole eggs; feathers, hackles, down from [fol. 151] ducks and geese, and quills. Certain items considered to be manufactured products are: chickens and turkeys, smoked, cooked, or canned; ducks, geese, and squab, cooked or canned; frozen whole eggs, frozen yolks, frozen albumin, dried egg powder, dried egg yolks, dried egg albumin, and chicken down and fiber.

A motor carrier representative explained that in Minnesota eggs usually move from the farm to one of the numerous packing plants in that State, where they are cooled, graded and candled. During April, May and June, 80 per cent of the eggs shipped out of Minnesota are oiled. The eggs are then placed in cases. The grading is now done extensively by machinery. In the opinion of this person, the eggs become a manufactured product after being processed in the packing plants.

The examiner concluded that the following are unmanufactured agricultural commodities: (1) chickens, turkeys, ducks, geese, and squab, alive or killed, picked, drawn, cut-up, frozen or unfrozen, (2) feathers, hackles, quills, and down from ducks and geese; and (3) eggs, including whole eggs and oiled eggs, but excluding frozen or dried eggs, and frozen or dried egg yolks and albumin.

A number of the exceptants assail the examiner's finding with respect to the items embraced in (1) above. They contend that this finding is contrary to previous decisions of division 5, and that the conversion of a "live inedible fowl" into "a dead edible fowl" satisfies the definition of the word "manufacture" as laid down by the courts. They argue that if dressed poultry is to be considered an unmanufactured agricultural commodity then fresh meat and meat products should be accorded a similar classification. Certain of the parties contend that the processing of poultry does not differ materially from the treatments accorded fresh vegetables in the freezing process, and that since [fol. 152] the latter are deemed to be manufactured products, no distinction should be made in the case of dressed poultry. Replants say that dressed poultry still has all of its original characteristics except those which have been removed in the dressing process, and that the classification of this commodity as an unmanufactured agricultural commodity is proper.

The words "agricultural commodities (not including manufactured products thereof)" do not include ordinary livestock as the latter are separately mentioned in section 203 (b)(6). Section 20 (11) of the act provides that "The term 'ordinary livestock' shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly

valuable for breeding, racing, show purposes, or other special uses." It necessarily follows that the term as used in section 203 (b)(6) has the same meaning. Livestock, such as race horses, show horses and the like do not come under the classification of "ordinary livestock," and the transportation of animals of this type is subject to the certificate or permit requirements of the act. *Owsley Common Carrier Application*, 31 M.C.C. 778. Poultry, however, are included within the broader description "agricultural commodities". It is clear also that certain products of live animals, such as are embraced in the definition of ordinary livestock, are likewise included; and there is no dispute that wool, at least in the form sheared from the [fol. 153] sheep, is an agricultural commodity. These products are in themselves, basic agricultural commodities, separate and distinct from the livestock. But slaughtered animals are not embraced in the definition of ordinary livestock and we are impelled to conclude that the products thereof, such as fresh meat and meat products, do not fall within the description "agricultural commodities" as used in section 203 (b)(6). It logically follows that neither killed poultry nor any products thereof come within the term under consideration. We conclude that poultry other than that alive is not an agricultural commodity within the meaning of Section 203 (b)(6). Further, we are of the opinion that birds of the air such as doves and pigeons are not agricultural commodities.

[fol. 154] With respect to feathers, hackles, quills, and chicken down, down obtained from ducks and geese, and chicken fiber, as these items are not products of live poultry they do not come within the approved definition of the term in question, and need not be further considered.

The examiner's finding with respect to eggs is challenged by one exceptant on the ground that division 5 has heretofore classified eggs as both dairy and packing house products. *Miller Extension of Operation—Iowa and Illinois*, 43 M.C.C. 577, and *Modification of Permits—Packing House Products*, 46 M.C.C. 23, and 48 M.C.C. 628. The fact of such classification does not establish that the items so classified are manufactured products of agricultural commodities. For instance, in the last-cited case milk also is

classified as a dairy product, although it is clear that Congress intended this commodity to be included in the category of unmanufactured agricultural commodities. Eggs are produced on the farm and are also graded and oiled there. Eggs are oiled merely for the purpose of retaining them in a fresh condition for a longer period of time than would otherwise be possible. The appearance, property, or quality of the egg is not changed. Compare *Emery Transp. Co. Interpretation—Frozen Eggs*, 48 M.C.C. 779. We conclude that eggs in the shell, including oiled eggs, are agricultural commodities within the meaning of section 203 (b)(6). A different conclusion is reached, however, in respect of whole or shelled eggs. The removal of the shell, as in the case of raw shelled peanuts, changes the egg into a manufactured product. No one questions the conclusion with which we agree, that dehydrated and frozen eggs are manufactured products. Such products possess new characteristics, properties, and qualities.

Livestock Group.—The basic commodities comprising the livestock group are hides, pelts, or skins, wool, mohair, and manure. The treatment accorded hides, including [fol. 155] pelts or skins, consist of collecting, washing,²¹ grading, drying, storing, salting, and packaging. The same operations or treatments, except salting, apply to wool and mohair. Manure, principally animal droppings, is collected, dried, stored, packaged, dehydrated, and pulverized.

Hides, which are produced largely in commercial slaughtering houses, and to some extent on the farm, are salted merely to prevent spoilage before reaching the point where manufacturing begins. Salting is said not to change the character of the hide. Nearly all hides produced on farms are salted there, or they are sold to a local collector who salts them prior to shipment. Both the green and salted hides move from the farm to curing and tanning plants. Wool and mohair are scoured—usually at some point off the farm—for the purpose of getting it clean by removing fats, oils, and dirt. Wool is first packaged in sacks at the point of production, then shipped to concentration points where the wool is graded and baled. Some grading, however, is done by the producer.

²¹ As applied to wool and mohair the term is "scouring".

Manure is dehydrated in order to remove the excess moisture. The dehydration is accomplished by placing the commodity in a "rolling drum" through which hot air is blown. The same result could be achieved by natural drying. After this process, it is pulverized by grinding in order that it may be more readily packaged and spread, but the character of the article is said not to be changed thereby. The two treatments usually take place somewhere near meat packing-houses or major concentration points of livestock.

The scientist testifying in respect of this group does not consider the articles so treated to be manufactured products. The following treatments, in his opinion, would cause the particular commodities affected to become manufactured products: Curing and tanning hides, chemical treating (scouring-carbonizing), spinning or weaving of wool and mohair.

[fol. 156] Wool tops and noils, considered by the scientist to be manufactured products, are the fibers which are derived from the combing process, the tops being the long fibers and the shorter curls are the noils. Combing is said to be part of the manufacturing process whereby fleece is broken down into the various components that enter different avenues of manufacturing to produce different products.

The scientist regards as unmanufactured agricultural commodities the following: Green hides, salted hides, pelts, skins, wool, mohair, clean wool, manure and animal droppings from pens and feed lots. The following are listed as manufactured products: Cured hides, leather, wool fat, tops, and noils.

The examiner concluded that pelts, skins, green and salted hides, wool and mohair, including that scoured, and manure are unmanufactured agricultural commodities. It is our view, and we so find, in light of the approved definition, that pelts, skins, and green and salted hides are not agricultural commodities within the meaning of section 203(b)(6). With respect to wool and mohair, the rail carriers concede that these items packed in grease are unmanufactured agricultural commodities, but they insist that cleaning and scouring of such articles substantially

change their condition and result in manufactured products. We are inclined toward such a conclusion. The scouring is for the purpose of removing fats, oils, greases, and other dirt from the wool and mohair and is the first step in the ultimate change of the raw product to a finished product. We conclude that the cleaning and scouring of the wool and mohair causes a sufficient change in the product to bring these commodities outside of the scope of an unmanufactured agricultural commodity.

Finally, the rail carriers contend that manure from pens and feed lots which is dried or dehydrated, pulverized, and packaged, is not an agricultural commodity since it is not produced on the farm. We do not agree with this reasoning. Manure in its natural state unquestionably comes within the partial exemption but the evidence is not sufficiently comprehensive to enable us to determine the point at which the commodity becomes a manufactured product.

Dairy Group

The basic agricultural commodities concerning which a scientist specializing in the dairy field offered evidence are milk, cream, and skim milk. The various treatments or processes which these commodities undergo and which he deems to be non-manufacturing are: For milk—milking, straining, cooling, pasteurizing, homogenizing, freezing, adding vitamin concentrates, standardizing, and bottling; for cream—cooling, pasteurizing, homogenizing, freezing, standardizing, and bottling; and for skim milk—cooling, pasteurizing, freezing, adding vitamin concentrates, standardizing, and bottling.

Pasteurization is a process by which milk is heated to a sufficiently high temperature and for a sufficient time to kill the pathogenic organisms which may be present. This is done to conform to State laws and to make the product safer for human consumption. It is said to change the character of raw milk only slightly, if at all. Very little pasteurizing is done on the farm; most of it is done in dairies located in the various cities throughout the United States. Homogenization, which is done principally in the dairies, is a mechanical treatment which reduces the size of the fat globules in milk and cream. After either or both

of these treatments, the commodity, in the opinion of the witness, remains milk or cream as the case may be. Milk is strained merely to remove extraneous dirt and cooling slows down the bacterial action. Freezing, a fairly recent process in the dairy field, causes the water in the milk to form crystals. In reality it is said to be intense cooling for preservation purposes, and if properly done, the milk when thawed has practically the same characteristics as prior to freezing. Standardization is the practice by which [fol. 158] cream is separated from a portion of the whole milk, and skim milk is added to bring the percentage of the milk to a minimum standard in order to comply with certain minimum requirements of the various States.

The "adding of vitamin concentrates," such as for example vitamin "D," merely increases the concentration of components already present in the milk. Although the scientist admits this processing may improve the milk somewhat, he does not consider it to be a manufactured product.

Treatments, which in the opinion of the scientist convert the articles to manufactured products are: The adding of non-milk constituents, churning, concentrating, drying fermenting, and curdling. The first-mentioned treatment causes the resulting article to become a manufactured product because the added materials, such as chocolate, vanilla, and gelatin, are not milk constituents. Concentrating is a treatment by which evaporated or condensed milk is produced. Drying involves concentrating to a degree that the resulting product is solid; fermenting is the process by which culture buttermilk is obtained; and curdling is an essential process in making cheese.

The scientist concludes that the following items are unmanufactured agricultural commodities: Milk, skim milk, pasteurized milk, homogenized milk, frozen milk, vitamin "D" milk, cream, frozen cream, pasteurized cream, homogenized cream, pasteurized skim milk, vitamin "D" skim milk, and frozen skim milk. He lists as manufactured products the following: Chocolate milk, butter, buttermilk, evaporated milk, condensed milk, dried milk, cultured milk, [fol. 159] cheese of various kinds, butter oil, dried cream, devonshire cream, condensed skim milk, casein, lactose,

wheys, ice cream mix, and ice cream. In determining the foregoing classification, he has considered as unmanufactured agricultural commodities those dairy products the characteristic of which have been changed only slightly, if at all, and which are used in the same manner as prior to processing.

The examiner concluded that milk, cream, and skim milk, standardized milk, pasteurized or frozen milk, cream, and skim milk, homogenized milk and cream, and vitamin "D" milk and skim milk, are unmanufactured agricultural commodities. No exception is taken to such finding in respect of standardized milk and raw milk, cream, and skim milk. Certain of the parties contend, however, that pasteurization, homogenization, and fortification should be regarded as manufacturing. They argue that homogenized milk and cream and vitamin "D" milk should be considered manufactured products because the appearance of the milk after such processing differs from that of raw milk in that the cream is not visible.

The legislative history of the act clearly shows that Congress intended pasteurized milk to fall within the partial exemption in question. The other treatments mentioned, such as homogenization and fortification with vitamin concentrates while possibly improving the milk or cream somewhat, do not change the basic character of the commodities in any material respect. The commodities have the same beneficial uses as theretofore. We agree with the conclusions reached by the examiner, except as to frozen milk, frozen cream, and frozen skim milk. It is our view, and we so conclude that these commodities have been so changed as a result of the freezing process as to convert them to manufactured products. The addition of non-milk constituents, such as chocolate, the churning of cream, and the concentrating, drying, fermenting, curdling, etc., of milk, cream or skim milk clearly give to the milk or cream new properties, combinations, or qualities and constitute them manufactured products.

A scientist specializing in forestry submitted evidence relative to the treatment of forest products preparatory to marketing. An exhibit introduced lists the basic commodities considered and the treatments or processes, regarded by him as non-manufacturing, accorded each. Logs and bolts²² are felled, bucked, and peeled. In addition to these treatments pulpwood is cut, poles are roofed and gained; and piling is treated. Fuel wood is felled, bucked, and cut. Harvesting is the only non-manufacturing treatment accorded the following: Crude resin, maple sap, bark, leaves, and Spanish moss. Christmas trees and greenery (holly and other greens used for Christmas decorations) are harvested and coated.

Felling, bucking, and peeling are said to be essentially harvesting processes. Logs are steam-peeled upon arrival at the mill. This operation is for the purpose of facilitating sawing. Logs are cut or sawed into smaller pieces for convenience in handling. This operation also is performed in the woods. "Roofing and gaining" refer respectively to the cutting of a ridge at the end of a pole and the cutting of a notch for the cross member which supports wires. Poles or piling are frequently treated with a preservative, such as creosote, to prevent decay. The scientist explained that the "end product" (the pole or piling) is to all intents and purposes the same as it was before treatment, although the treated pole has a greater value than one untreated. Crude resin is harvested by slicing the pole tree with a knife or other tool. Christmas trees are harvested in the woods or on the farms where they are grown, and some [fol. 161] times coated by spraying with various materials. This treatment is designed to prevent evaporation, thus keeping the leaves from falling prematurely.

Treatments considered by the scientist to be such as to render the article a manufactured product are: The sawing and hewing of logs; slicing and machining of bolts; chipping and grinding of pulpwood; distilling of crude resin; cooking of maple sap; distilling and cooking of bark; distilling of leaves; weaving of greenery; and retting Spanish

²² A bolt is a form of log.

moss. If a log is hewn into something that no longer resembles the original log, it is in his opinion a manufactured product.

The scientist lists the following items as unmanufactured agricultural commodities: Logs, bolts, pulpwood, poles, piling, fuel, wood, crude resin, maple sap, bark, wood, leaves, Christmas trees, greenery, and Spanish moss. He deems the following to be manufactured products of agricultural commodities: Lumber, ties, veneer, handles, pulp, paper, resin, turpentine, maple sugar, syrup, bark extract, charcoal, extract, leaf extracts, wreaths, and retted moss.

Additional evidence concerning practices in the production of pulpwood was submitted by representatives of certain associations and shippers. Pulpwood is the basic raw material from which woodpulp and paper is made. It is usually cut into 4 or 5 foot lengths for ease in handling. The pulpwood produced in the United States comes from numerous farm woodlots and small timber tracts. Some 260,000,000 acres are in small holdings of less than 5,000 acres, and 86 percent is comprised of tracts less than 100 acres. The total acreage mentioned is owned by approximately 4,250,000 persons, of which the great bulk, or 3,250,000 are classified in the national census as farmers. In 1947, approximately 172,000 acres of tree seedlings were [fol. 162], planted in the United States. Tree seedlings that have been planted to date in this country cover an area of over 6,000,000 acres. In Minnesota, Michigan, and Wisconsin, it is common practice for farmers to produce pulpwood as an adjunct to their farming operations. The great majority of the trucks used for hauling pulpwood is devoted to that purpose or for the transportation of other farm commodities. Approximately 90 percent of the traffic moves intrastate, and the remaining interstate traffic is transported equally in private carriage and by for-hire trucks. Pulpwood is considered by these persons to be an unmanufactured agricultural commodity, but after it is made into pulp, it admittedly becomes a manufactured product.

The examiner concluded that logs, pulpwood, crude resin, maple sap, bark, leaves, Christmas trees and greenery, coated or uncoated, and Spanish moss are unmanufactured.

agricultural commodities. Although, on exceptions, the rail carriers contend that the above-named items are products of the forest and therefore not agricultural commodities, their exceptions in the main are directed to the examiner's classification of pulpwood. At the oral argument, however, they concede that if pulpwood is now ordinarily a "farm crop" it should be regarded as an unmanufactured agricultural commodity, but that "the lumbering interests who are also going to haul logs and who are not engaged in farm operations" should not receive the benefits of the partial exemption.

[fol. 163] The planting and growing of trees particularly those for use as pulpwood is becoming increasingly a farming operation. There is no practical distinction between pulpwood and bolts, poles, piling, fuel wood, and other parts of trees that are felled for the purpose of further manufacture. We conclude that trees which have been felled and those trimmed, cut to length, peeled or split, but not further processed, are unmanufactured agricultural commodities within the meaning of section 203 (b) (6). We agree also with the examiner's conclusions in respect of crude resin, maple sap, bark, leaves, Spanish moss, and greenery.

Nursery Stock, Flowers, and Bulbs

A representative of the American Association of Nurserymen, Inc., composed of 1,176 members in 44 States presented evidence concerning the methods and practices prevalent in the nursery industry. This industry produces fruit trees and small fruit plants, ornamental plants, including shade trees, evergreen and deciduous shrubs, ground covers, etc., and trees and shrub seedlings for reforestation, shelter belts, and other comparable uses. It also engages in the propagation of root crops, such as rhubarb and asparagus. There are several major methods of production, either from the planting of seeds, by grafting or budding, or layering. Illustrative, is the production process of an apple tree. First, the seed is planted, and seedlings are harvested at the end of the first year. The seedlings are then graded according to size and sometimes are shipped to other nurserymen for further growing. The seedlings are thereafter replanted and by the grafting or budding process ap-

ple trees are produced. After they become sufficiently mature, the trees are dug from the soil and either immediately sold for planting in commercial orchards or other places [fol. 164] or they may be stored in barns on the farm. If stored, the trees are graded according to size during the winter months and are sold through regular channels the following spring. Similar production methods are followed with ornamental plants.

During the production process, the plants may be pruned and sheared. Prior to sale the tops and roots are usually pruned in order to remove any weak branches or roots. Fruit trees, berry bushes, strawberry plants, asparagus and rhubarb roots, shade trees and deciduous trees and shrubs, are tied into bundles of various numbers depending upon the grade. In some cases, such as rose bushes, perennial plants, and certain shrubs, the plants are individually packed with peat moss or other moist material about the roots. In the case of evergreens, the plants are dug with a ball of earth about the roots, and wrapped in burlap in order to keep it intact during the course of shipment.

Another item of nursery stock is that of seedling plants produced on nursery farms for use in shelter belts, farm wood lots, reforestation, etc., and for the production of Christmas trees. The forest tree seedlings and shrubs are produced from seeds or cuttings in tremendous quantities and are merchandised as 1, 2, 3, or 4 year old seedlings. Sometimes the seedlings are transplanted from the original seed beds to rows where they are cultivated for 1 or 2 years in addition to a corresponding period in the seed bed. The representative considers that none of the described processes changes the original character of the plant from that of an agricultural commodity.

Evidence pertaining to practices within the florist industry was presented on behalf of the Society of American Florists, which represents 47 associations within the industry [fol. 165] through direct affiliation. Cut flowers valued at 200 million dollars are annually shipped from growers to market in both intrastate and interstate commerce. Most of the shipments move by truck either direct to a market or to a railhead. A substantial number of exempt motor vehicles are used in this transportation.

Flowers are shipped in their natural state, the stems being clipped to remove the flowers from the earth, and the flowers are packaged to prevent injury in shipment. The producers, some of whom are farmers, usually grade the flowers according to quality and size, bunch them, and place them in a corrugated box. Most of the described preparation for market is done by hand. Various types of bulbs, such as gladioli, tulip, and iris bulbs, also move in interstate commerce. These bulbs are packed at the point of production for the most part in wooden crates. They may be repackaged by wholesale and retail distributors. Potted plants are frequently individually wrapped for shipment. Producers usually precool the flowers, potted plants, or bulbs, incident to shipment to the primary market, in order to prolong the life of these items.

The examiner concluded that nursery stock, cut flowers, and bulbs, are unmanufactured agricultural commodities. The rail carriers contend that these articles are not agricultural commodities as they are not generally grown on farms. Certain repliants contend that the term "horticulture," which is recognized as one of the main divisions of agriculture, includes not only the growing of fruits and vegetables, but flowers and ornamental plants as well. They argue that it is illogical to assume that Congress intended to include certain products falling within the category of horticulture, and to exclude others.

[fol. 166] For reasons previously stated, we are unable to conclude that nursery stock, flowers, and bulbs are agricultural commodities within the meaning of section 203 (b) (6).

Miscellaneous Commodities

Considerable honey is produced in Alabama and 95 percent of it is strained on the farm prior to marketing, the remainder is marketed in its natural form in the comb. The record is not clear as to whether any further treatment is accorded strained honey, other than the mere straining.

Sugar cane is produced extensively in Georgia. The cane after harvesting is run through a mill which separates the juice from the cane. The juice is then placed in an evaporator, or boiler and by the application of heat a large portion of the water content is removed, the residue being

a syrup. A further removal or separation of the remaining water produces raw sugar. These processes are said to be necessary in order "to make the cane crop available as a food," and a Georgia representative of the sugar cane industry regards the resulting articles as non-manufactured agricultural commodities because "nothing new has been created and the initial useful value of the cane hasn't been changed".

The examiner made no specific recommendation with respect to the named miscellaneous commodities. We are of the opinion, however, that honey strained or in the comb is an unmanufactured agricultural commodity. In such condition it is in its natural state. The mere harvesting of sugar cane, of course, does not alter its natural state. But the syrup and sugar produced by subsequent processes, are [fol. 167] unquestionably manufactured products since the articles have acquired new forms, qualities, or properties. We are also of the opinion that sugar beets in their natural state are an unmanufactured agricultural commodity.

Cases in Conflict Overruled

With the exception of the *Harwood* case, we did not reopen any of the numerous proceedings in which a determination has heretofore been made in respect of certain commodities falling within or without the partial exemption. The findings in certain previous reports conflict with our findings herein. In order to remove any doubt in the matter, to the extent that the findings in such previous reports differ from those herein, they are hereby overruled.

[fol. 168]

Requests for Further Hearing

Interstate Common Carrier Council of Maryland, Inc., requests a further hearing in the investigation proceeding (a) to develop more fully the industrial practices existing in respect of the processing of poultry and "peanut products" and (b) "to receive" evidence concerning the "effects of the within proceedings on the National Transportation Policy." It fails to state what evidence, if any would be adduced at a further hearing. Service Trucking Company, Inc., also requests further hearing for the purpose of submitting additional evidence relative to market-

ing practices in the poultry industry. It claims to have been without "actual notice" that poultry was to be included in the investigation proceeding, despite its apparent familiarity with the second report in the *Monark Egg* case, in which division 5 stated that poultry is included within the description agricultural commodities. Although this carrier describes at some length the evidence which would be adduced if a further hearing is held, such evidence would not materially add to that now of record and would not affect our findings herein. Accordingly, the requests for further hearing are denied. Motor Carriers Traffic Association also requested a further hearing in the investigation proceeding for the purpose of submitting additional evidence relative to redried leaf tobacco. In view of our conclusions herein, the association's request for further hearing is also denied.

No. MC-107669

There remains for consideration, the application in No. MC-107669 (the *Harwood* case): As stated in the prior report in that proceeding, the need there found to be existing for Harwood's proposed service was for the transportation of fresh fruits and vegetables and processed fresh vegetables (including those chopped up), from and to described points and areas. In view of our conclusions herein that chopped-up vegetables do not come within the partial exemption, a permit is required at least with respect to that portion of the operation proposed. As previously stated, however, neither applicant nor anyone in his behalf appeared at the further hearing in the Harwood proceeding. In the circumstances, it appears that applicant, Norman E. Harwood, is no longer interested in his application. Accordingly, we shall deny the application.

Findings

In No. MC-C-968, we find that the term "agricultural commodities (not including manufactured products thereof)" as used in section 203 (b)(6) of the Interstate Commerce Act means: Products raised or produced on farms by tillage and cultivation of the soil (such as vegetables, fruits, and nuts); forest products; live poultry and bees; and commodities produced by ordinary livestock, live

poultry, and bees (such as milk, wool, eggs, and honey), but not including any such products or commodities which, as a result of some treatment, have been so changed as to possess new forms, qualities, or properties, or result in combinations.

We find that the term "agricultural commodities (not including manufactured products thereof)" as used in section 203 (b) (6) includes: (1) fruits, berries, and vegetables which remain in their natural state, including those packaged in bags or other containers, but excluding those placed in hermetically sealed containers, those frozen or quick frozen, and those shelled, sliced, shredded, or chopped up; (2) fruits, berries, and vegetables dried naturally or artificially; (3) seeds, including inoculated seeds, but not seeds [fol. 170] prepared for condiment use or those which have been deawned, scarified or otherwise treated for seeding purposes; (4) forage, hay, straw, corn and sorghum fodder, corn cobs, and stover; (5) (a) hops and castor beans, and (b) leaf tobacco, but excluding redried tobacco leaf; (6) raw peanuts, and other nuts, unshelled; (7) whole grains, namely, wheat, rye, corn, rice, oats, barley and sorghum grain, not including dehulled rice and oats, or pearled barley; (8) (a) cotton in bales or in the seed, (b) cottonseed and flaxseed, and (c) ramie fiber, flax fiber, and hemp fiber; (9) live poultry, namely, chickens, turkeys, ducks, geese, and guineas; (10) milk, cream, and skim milk, including that which has been pasteurized, standardized milk, homogenized milk and cream, vitamin "D" milk, and vitamin "D" skim milk; (11) wool and mohair, excluding cleaned and scoured wool and mohair; (12) eggs, including oiled eggs, but excluding: whole or shelled eggs, frozen or dried eggs, frozen or dried egg yolks, and frozen or dried egg albumin; (13) (a) trees which have been felled and those trimmed, cut to length, peeled or split, but not further processed, and (b) crude resin, maple sap, bark, leaves, Spanish moss, and greenery; (14) sugar cane, sugar beets, honey in the comb, and strained honey.

In No. MC-107669, on further hearing, we find that applicant has failed to establish that he is willing and able to conduct the proposed operation; and that the application should be denied.

There are differences of opinion among the members of the Commission with respect to whether certain of the commodities named in the findings in the title proceeding are agricultural commodities within the meaning of section 203 (b)(6)^o of the act, but to the extent that the commodities named therein are found to fall within the exemption the finding with respect to each commodity or group of commodities has the approval of a majority of the Commission although not the same majority in all instances.

[fol. 171] An appropriate order will be entered discontinuing the proceeding No. MC-C-968, and denying the application in No. MC-107669.

LEE, Commissioner, concurring in part:

On the whole I think this is a sound report. It has my approval to the full extent to which it finds that commodities named therein fall within the partial exemption provided in section 203 (b)(6) of the act. I find it necessary separately to state my views because of the findings, with which I am unable to agree, that certain agricultural commodities do not fall within that exemption after having been subjected to commonly followed forms of processing. I believe these findings improperly narrow the scope of the exemption contrary to the intention of Congress.

Senate Bill 1629, which as enacted, and later amended, is now Part II of the Interstate Commerce Act, as reported to the House of Representatives provided for the partial exemption of motor vehicles used exclusively in carrying "unprocessed agricultural products." After considerable debate on the floor of the House as to the meaning of the quoted words the subcommittee in charge of the bill proposed an amendment which replaced them with the words "agricultural commodities (not including manufactured products thereof)", the proper interpretation and application of which we are here considering. In explanation of this amendment the Chairman of the subcommittee stated:

Mr. Chairman, we have heard a good deal of discussion this afternoon as to what is a processed agricultural product, whether that would include *pasteurized milk* or *ginned cotton*. It was not the intent of the Committee that it should include those products. Therefore, to meet the views of

many Members we thought we would strike out the word "unprocessed" and make it apply only to *manufactured products*. (Emphasis supplied.)

The amended provision was adopted by the House and thereafter it and other House amendments were concurred in by the Senate after the Chairman of the Senate Committee explained that the House amendments generally liberalized the provisions of the bill.

The words "not including manufactured products thereof" were carefully chosen by the House subcommittee, as indicated by the Chairman's statement, to draw the line between products which are manufactured from agricultural commodities and which should not be exempt, on the one hand, and, on the other, agricultural commodities which have been subjected to processing which does not change them into manufactured products and which should fall within the exemption. The specific reference in the Chairman's statement to pasteurized milk and ginned cotton indicates quite clearly, I think, that the words "manufactured products thereof" do not mean agricultural commodities which have been subjected to such processing as pasteurizing, or ginning, or shelling, or slicing, or shredding, or chopping, or freezing, or drying, or dressing, or cleaning, or scouring, and which after such processing still retain the names, characteristics, or uses which they previously had. It appears that the House, in adopting the subcommittee's amendment, and the Senate, in concurring in that amendment, intended that the distinction between any particular "agricultural commodity", falling within the exemption, and "manufactured products, thereof", excluded from the exemption, is not to be based upon whether such "agricultural commodity" has been subjected to processing, such as the simple processing of shelling an egg or [fol. 172] even the elaborate processing of pasteurizing milk with the relatively complex and costly equipment of a modern, big-city dairy, but is to be based upon whether, as the result of processing, such "agricultural commodity" has been so changed that a new and distinctive commodity or article is produced. To give recognition to this intention of the Congress in interpreting the words "manufactured products thereof" will accord to them their usual

and popular meaning which, even in the absence of supporting legislative history, should here be attributed to them.

The decisions of the United States Supreme Court dealing with the meaning of the word "manufactured" strongly support the view that commonly followed forms of processing do not change agricultural commodities into manufactured products. In *Harträuft v. Weigmann*, 121 U. S. 609, shells imported from abroad had been subjected to a duty thereon under a tariff imposing a 35 percent ad valorem tax on manufactured of shells. The shells were sold for ornaments except that some were sold to be made into buttons, handles to penknives, et cetera. The outer layer had been cleaned from the shell by acid, the second layer was ground off with an emery wheel, and some of the shells were etched by acids so as to produce inscriptions on them. Unmanufactured shells were exempted from the duty, and the importer sought to recover the amount exacted of him. In rendering judgment for the importer the court said:

We are of the opinion that the shells in question were not manufactured and were not manufactures of shells, within the sense of the statute imposing a duty of 35 per centum upon such manufacturers, but were shells not manufactured, and fell under that designation in the free list. They were still shells. They had not been manufactured into a new and different article having a distinctive name, character or use from that of a shell. The application of labor to an article, either by hand or by mechanism, does not make the article necessarily a manufactured article, within the meaning of that term as used in the tariff laws.

This decision was cited and followed by the same Court in another tariff case, *Anheuser-Busch Assn. v. United States*, 207 U. S. 356, wherein it was held that the treatment of corks by a manufacturer and exporter of beer, by way of sterilizing them and closing the seams, holes, and crevices by a chemical bath and coating process, so as to adapt them for export use, did not entitle the manufacturer to the drawback allowed in the tariff act on imported raw material used in the manufacture of articles in this country. The Court said:

Manufacture implies change, but every change is not

manufacture, and yet every change in an article is the result of treatment, labor and manipulation. But something more is necessary, as set forth and illustrated in *Hartrauft v. Weigmann*, 121 U. S. 609. There must be transformation; a new and different article must emerge, "having a distinctive name, character or use." This cannot be said of the corks in question. A cork put through the claimant's process is still a cork:

[fol:173] In a more recent case, *Fruit Growers, Inc. v. Brogdex Co.*, 283 U. S. 1, the court considered whether the impregnation with borax of the rind of an orange, through immersion in a solution which rendered the orange resistant to blue mold decay, constituted manufacturing and resulted in a manufactured article within the meaning of the laws relating to patents. In holding that oranges so treated are not manufactured articles the court said:

"Manufacture", as well-defined by the *Century Dictionary*, is "the production of articles for use from raw or prepared materials by giving to these materials new forms, qualities, properties, or combinations, whether by hand-labor or by machinery". Also "anything made for use from raw or prepared materials."

Addition of borax to the rind of natural fruit does not produce from the raw materials an article for use which possesses a new or distinctive form, quality, or property. The added substance only protects the natural article against deterioration by inhibiting development of extraneous spores upon the rind. There is no change in the name, appearance, or general character of the fruit. It remains a fresh orange fit only for the same beneficial uses as theretofore.

Thus, in considering the tariff and patent laws the Supreme Court has held that manufacture implies change, that there must be transformation, that a new and different article must emerge and that if there is no transformation into a new and different article, having a distinctive name, character, or use, of the commodity or article which has been subjected to the application of labor, either by hand or by mechanism, or to treatment, labor or manipulation, it is still the same commodity or article and not a manufactured

product thereof. No sound reason appears for reaching a different result in the interpretation of the Interstate Commerce Act.

After some commonly followed processing the commodities to which I have reference are not new and different articles. On the contrary, each remains the same agricultural commodity, retaining its well-known name and its general characteristics and uses. The slicing of a carrot or the shelling of an egg or of a peanut does not change it into a new and distinctive article. Nor does the deawning and scarifying of alfalfa seed, or the redrying of tobacco leaf, or the cleaning and scouring of wool change them into new and distinctive articles. After such slicing, shelling, deawning, scarifying, redrying, cleaning or scouring there still remains what is known as a carrot, an egg, a peanut, alfalfa seed, tobacco leaf and wool. Each retains its former characteristics and uses.

As I have heretofore pointed out in other proceedings, it may be that in the preparation for freezing some fruits, berries or vegetables are so changed in character and appearance as to warrant the conclusion that they are in fact manufactured products. However, after freezing or quick-freezing most fruits, berries, and vegetables retain their inherent characteristics and appearances and are suitable only for the same uses as before undergoing such freezing.

Chickens, turkeys, ducks, geese and guineas alive and after having been killed are still known by the same names. The dressing and cutting into pieces of a chicken or a turkey [fol. 174] does not result in the production of a distinctive article having any new characteristics or uses. It still is an agricultural commodity. Surely the Thanksgiving turkey which the farmer's wife so carefully stuffs and places in the oven is not a manufactured article.

It is my considered opinion that the following are agricultural commodities and as such fall within the partial exemption provided in section 203 (b) (6):

Fruits, berries and vegetables which have been shelled, sliced, shredded, chopped up, or frozen or quick frozen, with the possible exception of those which in their frozen state are substantially changed in character and appearance.

- Seeds which have been deawned, scarified, or otherwise treated for seeding purposes.
- Redried tobacco leaf.
- Shelled raw peanuts and other shelled raw nuts.
- Dressed and cut-up chickens, turkeys, ducks, geese and guineas.
- Cleaned and scoured wool and mohair.
- Shelled and frozen eggs.

Commissioner Patterson concurs in the result.

ROGERS, Commissioner, dissenting:

The findings of the majority name certain commodities which are considered to be included in the definition "agricultural commodities (not including manufactured products thereof)" within the meaning of section 203 (b) (6) of the Interstate Commerce Act. This decision places motor vehicles used in carrying the specified commodities within the partial exemption of that subsection and has the effect of enabling any person, including the professional truckman, to transport these commodities in interstate or foreign commerce, free from all regulatory provisions of the act, except the safety provisions of section 204. I am opposed to any construction of this subsection which in effect results in extending the exemption to any one who wished to enter the motor carrier field. That is not, in my opinion, a correct interpretation of the law.

The exemption in question should be administered in keeping with the principle in *I. C. C. v. Service Trucking Co., Inc.*, 186 Fed. (2d) 400. With this in mind, the majority view would enable a carrier holding a certificate authorizing the transportation of commodities not within the purview of section 203 (b) (6) to transport the named commodities for anybody, anywhere, so long as the two groups of commodities are not transported for compensation in the same vehicle at the same time. It would allow anyone to [fol. 175] become a professional truckman without proving a public need for the service. Such a carrier could for example, transport imported bananas from shipside at Port Everglades, Fla., to a market in New York City, which would be without benefit to our farmers. Congress did not, in my opinion, intend such a result. The legislative history

of the exemption shows clearly that Congress only intended to extend a benefit to the farmer by relieving him from the complex regulation provided for the professional truckman. The majority agrees with this in theory, but has extended the benefit of the exemption way beyond the farmer. Congress was concerned only with the farmer. Senator Wheeler indicated this when he said:

"In other words, any farmer who engages in casual trucking operations, say from his farm to Des Moines, Iowa, for the purpose of carrying his products and his neighbor's products, is within the exemption."

And on the House side, Representative Wadsworth used language indicating that the "professional truckman" should not be benefited by the exemption as follows:

"But the truckman to whom I refer is a professional truckman. He is not casual at all. He lives in the village and takes orders to carry goods in any direction he feels able to carry them and at a price he thinks is fair."

I am strongly of the belief that Congress intended to relieve from the regulatory provisions of the Act, except the safety provisions of section 204, the transportation of any farm commodity *from the farm to the point where the commodity first enters the ordinary channels of commerce*, while it is being transported either by the farmer himself or by someone on behalf of the farmer. The court in *I. C. C. v. Weldon*, 90 Fed. Supp. 873, affirmed United States Court of Appeals, Sixth Circuit, No. 11,247, decided April 9, 1951, following the channel of commerce theory, very aptly stated:

"Under the facts here the producer, or farmer, parts with all of his right, title and interest in the peanuts produced by him on delivery and sale to the shelling plant. There must be a time when peanuts cease to be the products of the farm and are considered manufactured articles, and it seems appropriate in dealing with the question here involved to say that peanuts are a manufactured product from the time same are sold by the farmer and delivered at the shelling plant."

The mere naming of a group of commodities which might reasonably be classed as "nonmanufactured" agricultural products and allowing the certificated carrier whose operating authority does not include the right to move such commodities or the no less professional carrier who proposes to handle them exclusively, to transport the named commodities, confers no constructive benefit upon the farmer. It will, however, adversely affect rail carriers and certificated motor carriers holding authority to transport these commodities inasmuch as they will be at a decided disadvantage in competing with carriers obliged to comply only [fol. 176] with the safety provisions of section 204. The decision of the majority, therefore, is not only contrary to the legislative intent, but is not conducive to practical regulation and sound economic conditions in the transportation industry.

I am authorized to state that Commissioner Cross concurs in this expression.

Commissioner Johnson dissents.

Commissioner Mitchell was necessarily absent and did not participate in the disposition of these proceedings.

Commissioner Knudson did not participate in the disposition of these proceedings.

[fol. 177]

Appendix

List of commodities held exempt of non-exempt by the Commission, division 5, of by the Bureau of Motor Carriers under section 203 (b)(6) of the Interstate Commerce Act.

I. Agricultural commodities held to be within the exemption:

(a) By the Commission, Division 5:

Raw milk—Derr Contract Carrier Application, 43 M.C.C. 437.

Cream, skim milk, standardized milk—Severson Common Carrier Application, 46 M.C.C. 6.

Mushrooms, fresh—Dougherty Common Carrier Application, 31 M.C.C. 793.

Apples, fresh, merely packed, not processed—Newman Contract Carrier Application, 44 M.C.C. 190.

Peanuts, unshelled—Monark Egg Corp., Contract Carrier Application, 44 M.C.C. 15.

Wool and mohair, in natural state—Arvan Everett Bates Extension—Texas, 48 M.C.C. 818.

(b) By the Bureau of Motor Carriers:

Broom corn.

Coffee (beans) green.

Cotton, ginned.

Cotton seed.

Eggs—bathed with hot oil which closes pores to aid in preservation.

Fruits and vegetables.

Beans, dried naturally.

Citrus fruit, artificially treated by ethylene gas or other methods to increase color or to protect from mold.

Fruit, dried naturally, even if bathed in a preservative solution before being transported.

Fresh fruits and berries, including imported graded, brushed or dusted with sulphur (opinion involved peaches); packed in sawdust (opinion involved grapes).

Shelled peas—where pea vines are cut and immediately put through a peavining machine which picks the pods from the vine and separates the peas from the pods.

Hay, loose or baled.

Honey, in natural state.

Nuts, Brazil, unshelled, imported (washed and bleached).

Peanuts, cleaned and graded by machines, but still in shell.

Plants, cabbage and tomato.

Seed corn hybrid.

Seed potatoes which receive no special handling or attention.

[fol. 178] Straw, loose or baled.

Wheat, threshed.

Wool, in natural state.

11. *Commodities held to be manufactured products, and hence not within the exemption:*

(a) By the Commission, Division 5:

Cottage cheese and cream cheese—Pohl Contract Carrier Application, 1 M.C.C. 707.¹

Clean rice, rice bean, rice polish—Dugan Contract Carrier Application, 7 M.C.C. 15.¹

Pasteurized milk—Luckey Common Carrier Application, 12 M.C.C. 739.¹

Fresh cut-up vegetables in cellophane bags and fresh vegetables, washed, cleaned, and packaged in cellophane bags or boxes—Harwood Contract Carrier Application, 47 M.C.C. 597.

Fruits and vegetables, quick-frozen—Newton Extension of Operations—Frozen foods, 43 M.C.C. 787.

Peanuts, shelled—Monark Egg Corp. Contract Carrier Application, 44 M.C.C. 15.

Peanut shells, ground—Harris and Callis Contract Carrier Application, 44 M.C.C. 169.

Poultry, killed and picked, though not drawn—Monark Egg Contract Carrier Application, 44 M.C.C. 15.

Leaf tobacco, redried—Yeary Transfer Company, Inc., Extension—Special Commodities, 49 M.C.C. 808; and W. C. Taylor Common Carrier Application, No. MC-110299, decided December 2, 1949.

(b) By the Bureau of Motor Carriers:

Barley, rolled.

Butter.

Coffee, ground or roasted.

Cottonseed meal and hulls.

Beans, packaged, dried artificially or packed in small containers for retail trade.

Fruits and vegetables, canned.

[fol. 179] Dried fruits, dried mechanically or artificially.

¹ Report and recommended order of joint board became effective as order of the Commission by operation of the law.

Peaches, peeled, pitted, etc., and placed in cold storage in unsealed containers.

Strawberries, capped, in syrup, in unsealed containers and placed in cold storage.

Cucumbers, packed in salt water as a preservative.

Honey, heated and bottled to prevent or retard granulation.

Milk, condensed; skim; powdered; buttermilk; vitamin D; Pasteurized.

Feathers.

Rice, cleaned or coated.

Tobacco, dried and with stems pulled and leaf chopped up.

III. *Commodities held by the Bureau of Motor Carriers not to be agricultural commodities and hence not within the exemption:*

Coal.

Flowers or ornamental plants.

Gladiolus bulbs.

Grass sod.

Gravel.

Hides, green (salted or unsalted).

Logs.

Mushroom spawn.

Naval stores, such as pitch, turpentine and other resinous products.

Rock.

Sand.

Shrubs, cut flowers and other nursery stock.

Seeds, which have received special attention and handling for marketing such as those prepared by seed houses and placed in packages for distribution by merchants.

Soil, top.

Sphagnum moss.

Trees, including Christmas trees.

[fol. 180]

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 13th day of April, A.D. 1951.

No. MC-C-968

Determination of Exempted
Agricultural Commodities

No. MC-107669

Norman E. Harwood Contract Carrier Application

It appearing, That by order entered in No. MC-C-968, the Commission, on its own motion, instituted an investigation into and concerning the meaning of the words "agricultural commodities (not including manufactured products thereof)" as used in section 203 (b) (6) of the Interstate Commerce Act;

It further appearing, That on December 16, 1947, the Commission, division 5, entered its report, 47 M.C.C. 597, and order in No. MC-107669 granting applicant, Norman E. Harwood, a permit authorizing certain operations, in interstate or foreign commerce, as a contract carrier by motor vehicle, and otherwise denying the application;

It further appearing, That upon consideration of petitions filed by the Secretary of Agriculture and the Atlantic Commission Co., Inc.; and others, the Commission reopened the proceeding in No. MC-107669 for further hearing on a consolidated record with No. MC-C-968;

And it further appearing, That full investigation of the matters and things involved has been made, and that the Commission, on the date hereof, has made and filed its report on oral argument herein containing its findings of [fol. 181] fact and conclusions thereon, which report and the report and order of December 16, 1947, in No. MC-107669, are hereby referred to and made a part hereof;

It is ordered, That the proceeding in No. MC-C-968 be, and it is hereby discontinued.

It is further ordered, That the order of December 16, 1947, in No. MC-107669, be, and it is hereby, vacated and set aside.

And it is further ordered. That the application in No. MC-107669, be, and it is hereby, denied.

By the Commission.

W. P. Bartel, Secretary.

(Seal)

[fol. 182] IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION TO COMPLAINT OF THE SECRETARY OF AGRICULTURE—Filed, August 30, 1954.

Now comes the defendant Interstate Commerce Commission, hereinafter referred to as the Commission, and for answer to the complaint herein filed by Ezra Taft Benson, Secretary of Agriculture of the United States, as an intervening plaintiff, admits, denies, and avers as follows:

1

The Commission admits the allegations in paragraphs I, II, III, and IV of the said complaint.

2.

The Commission admits the allegations in paragraph V, except the allegation that the Commission in the said proceeding found and concluded that inoculated seeds are not "agricultural commodities" within the meaning of Section [fol. 183] 203(b) (6) of the said Act; and avers that it found and concluded therein that inoculated seeds are agricultural commodities within the meaning of the said section.

3

The Commission denies each of and all the allegations in paragraph VI.

4

Further answering the said complaint, the Commission alleges that the findings in its said report and order were

and are, and each of them was and is, fully supported by the evidence admitted in the said proceeding; that the said findings afford an adequate basis for the Commission's conclusions therein; and that in making and entering the said report and order the Commission considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition brought to its attention by or on behalf of the parties to the said proceeding.

The Commission further alleges that the said report and order were not made or entered either arbitrarily or unjustly, or without proof, or contrary to the relevant evidence, or without evidence to support them; that in making its said report and order the Commission did not exceed the authority conferred upon it by law; and the Commission denies each of and all the allegations to the contrary contained in the said complaint, and denies that its said report and order are invalid or illegal for any of the reasons set forth in the said complaint, or for any other reason.

Wherefore, having fully answered, the Commission prays that the relief sought by the Secretary of Agriculture, as [fol. 184] intervening plaintiff, be denied and that the said complaint be dismissed.

(S.) Leo H. Pou, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.

(S.) Edward M. Reidy, General Counsel, of Counsel.

[fols. 185-220] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 221] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Civil Action No. 8285 and Civil Action No. 8396

FROZEN FOOD EXPRESS, Plaintiff; EZRA TAFT BENSON, Secretary of Agriculture of the United States, Intervening Plaintiff,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants; Common Carrier Irregular Route Conference of American Trucking Association, et al.

OPINION OF THREE-JUDGE COURT—January 26, 1955

Before Hutcheson, Chief Circuit Judge, and Connally and Kennerly, District Judges

CONNALLY, District Judge:

Filed pursuant to Secs. 1336, 1398, and 2321-2325, of Title 28; to Sec. 1009, of Title 5; and to Sec. 305(g), of Title 49, U.S.C.A., each of the foregoing civil actions attacks and seeks to restrain enforcement of an order of the Interstate Commerce Commission. Presenting the same [fol. 222] question of law, and substantial identity of parties, the actions were consolidated for hearing and trial. The question for determination is whether a number of different commodities, as later noted herein, all of which have their origin on the farm or ranch, fall within the scope of the so-called agricultural exemption (Sec. 303(b)(6)) of Part II of the Interstate Commerce Act (Title 49, U.S.C.A., Sec. 301, et seq.): By terms of the last-mentioned statute, motor vehicles used in carrying property consisting of "ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)", are exempt from Interstate Commerce Commission control (save for minor exceptions not here pertinent). The plaintiff in each of the consolidated actions, being a trucking concern holding a certificate of convenience and necessity from the Commission, desires to carry some or all of the com-

modities in question, unrestricted by the terms of its own certificate, or by other Commission regulation. Hence the plaintiff, supported to a considerable extent in this contention by the Secretary of Agriculture of the United States, urges upon the Court a broad interpretation of the statutory language "agricultural commodities (not including manufactured products thereof)", which would have the net result of enlarging this so-called agricultural exemption. The Commission, on the other hand, and those intervenors who align themselves with the Commission, urge upon us that most of the commodities in question, [fol. 223] by virtue of the treatment and processing which they receive, either have lost their identity as "agricultural commodities"; or have become "manufactured products thereof". The result of this argument is drastically to restrict the scope of the exemption.

Civil Action 8285:

In June, 1948, the Interstate Commerce Commission, of its own motion, instituted a proceeding, being MC-C-968 on its docket, in the nature of an investigation, to determine the meaning and scope of the term "agricultural commodities (not including manufactured products thereof)", as used in the above-mentioned statute. The proceeding was widely noticed in the affected trades and industries. Many interested parties, including the Secretary of Agriculture of the United States, the Commissioners of Agriculture from a number of the States, associations of shippers, motor carriers, and others, intervened. After extended hearings, during which much expert testimony was offered as to the manner and method of cleaning, preparing, packaging, and otherwise processing the various commodities in question, the Commission issued its report and order entitled "Determination of Exempted Agricultural Commodities" (52 I.C.C. Reports, Motor Carrier Cases, 511-566). In such report, the Commission announced its definition of such statutory term, which definition it then

"In No. MC-C-968, we find that the term 'agricultural commodities (not including manufactured products thereof)' as used in section 203(b)(6) of the Interstate

[fol. 224] undertook to apply to the various commodities under consideration, and enumerated those which it found to come within the statutory language, and those which it found to fall without.² Thereupon, the proceeding was terminated and removed from the Commission docket.

Commerce Act means: Products raised or purchased on farms by tillage and cultivation of the soil (such as vegetables, fruits, and nuts); forest products; live poultry and bees; and commodities produced by ordinary livestock, live poultry, and bees (such as milk, wool, eggs, and honey), but not including any such products or commodities which, as a result of some treatment, have been so changed as to possess new forms, qualities, or properties, or result in combinations."

² "We find that the term 'agricultural commodities (not including manufactured products thereof)' as used in section 203(b)(6) includes: (1) fruits, berries, and vegetables which remain in their natural state, including those packaged in bags or other containers, but excluding those placed in hermetically sealed containers, those frozen or quick frozen, and those shelled, sliced, shredded, or chopped up; (2) fruits, berries, and vegetables dried naturally or artificially; (3) seeds, including inoculated seeds, but not seeds prepared for condiment use or those which have been deawned, scarified or otherwise treated for seeding purposes; (4) forage, hay, straw, corn and sorghum fodder, corn cobs, and stover; (5) (a) hops and castor beans, and (b) leaf tobacco, but excluding redried tobacco leaf; (6) raw peanuts, and other nuts, unshelled; (7) whole grains, namely, wheat, rye, corn, rice, oats, barley and sorghum grain, not including dehulled rice and oats, or pearled barley; (8) (a) cotton in bales or in the seed, (b) cottonseed and flaxseed, and (c) ramie fiber, flax fiber, and hemp fiber; (9) live poultry, namely, chickens, turkeys, ducks, geese, and guineas; (10) milk, cream, and skim milk, including that which has been pasteurized, standardized milk, homogenized milk and cream, vitamin 'D' milk, and vitamin 'D' skim milk; (11) wool and mohair, excluding cleaned and scoured wool and mohair; (12) eggs, including oiled eggs, but excluding whole or shelled eggs, frozen or dried eggs,

[fol. 225] The plaintiff Frozen Food Express was not a party to the proceeding before the Commission. By amended complaint filed here July 12, 1954, plaintiff alleges that it desires to carry agricultural commodities (not including manufactured products thereof) for hire, to and from all points within the United States, irrespective of the limitations imposed by its own certificate; that the report of April 13, 1951, deprives plaintiff of its right to do so. Alleging that the action of the Commission, in entering the report in question, was arbitrary, capricious and unreasonable, that it constituted an abuse of discretion and a violation of the Commission's statutory powers, the plaintiff here seeks an injunction to restrain the Commission and the United States from enforcing or recognizing the validity of such report; restraining interference with the plaintiff's proposed transportation of such agricultural commodities (not including manufactured products thereof), and seeks an order of this Court declaring the report of the Commission of April 13, 1951, to be null and void.

The Secretary of Agriculture has intervened, denominating himself "Intervening Plaintiff". He makes common [fol. 226] cause with plaintiff in contending that a number of commodities³ are within the exemption. Several trucking associations, and some sixty southern and western railroad companies, have intervened. These interveners take

frozen or dried egg yolks, and frozen or dried egg albumin; (13) (a) trees which have been felled and those trimmed, cut to length, peeled or split, but not further processed, and (b) crude resin, maple sap, bark, leaves, Spanish moss, and greenery; (14) sugar cane, sugar beets, honey in the comb, and strained honey."

3 " (1) Slaughtered meat animals and fresh meats;

(2) Dressed and cut-up poultry, fresh or frozen;

(3) Feathers;

(4) Raw shelled peanuts and raw shelled nuts;

(5) Hay chopped up fine;

(6) Cotton linters and cottonseed hulls;

(7) Frozen cream, frozen skim milk, and frozen milk;

(8) Seeds which have been deawned, scarified, or inoculated."

a contrary view, and support the report of the Interstate Commerce Commission.

We are of the opinion that the action may not be maintained, and must be dismissed, for the reason that the report and order of the Interstate Commerce Commission of April 13, 1951, is not an "order" subject to judicial review under any of the statutes cited. The proceeding before the Commission was not an adversary one. The order which initiated it purported to do no more than direct that an investigation be made of the meaning of the statutory language. Notice was given only to the public. When the final report and order was forthcoming some two years later, the only "order" entered was one discontinuing the proceeding and removing it from the Commission's docket. The question is controlled by *U. S. v. Los Angeles R. R. Co.* (273 U. S. 284), holding a very similar "order" of the Interstate Commerce Commission which found, after an investigation, the value of certain railroad properties, not to be subject to review. The language of Mr. Justice Brandeis, speaking [fol. 227] for a unanimous Court there, aptly describes the order in issue here:

"The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or faculty; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation."

The proponents of jurisdiction here rely upon *Columbia Broadcasting System v. U. S.* (316 U. S. 407). It was there held that an order of the Federal Communications Commission promulgating certain rules and regulations requiring that the Commission deny a license to broadcasting stations under certain circumstances, was subject to judicial review,

upon a showing by the complaining party of strong equitable considerations. This authority is clearly distinguishable from the present case. The order there in question was entered in the exercise of the agency's rule-making power. Such orders, together with those fixing rates and those determining controversies before the administrative body, have long been recognized as subject to review (*U. S. v. Los Angeles R. R. Co.*, *supra*).

Likewise, the complaining party there showed an immediate and continuing threat of irreparable injury if the order were not reviewed. It is not so here. The statement of plaintiff that it desires to carry for hire most or all of the [fol. 228] commodities on the Commission's proscribed list, and that if it does so, the Commission likely will seek injunctive relief to restrain plaintiff, shows no basis for the intervention of a court of equity. Plaintiff will have an adequate remedy in the event of such interference.

It follows that Civil Action 8285 will be dismissed.

Civil Action 8396:

A complaint was filed December 23, 1953, with the Interstate Commerce Commission by East Texas Motor Freight Lines, Gillette Motor Transport, Inc., and Jones Truck Lines, Inc., charging that Frozen Food Express was and had been engaged in transporting fresh and frozen dressed poultry, and fresh and frozen meats, and meat products, for hire, between points in interstate commerce not authorized by its certificate of convenience and necessity. Frozen Food readily admitted that it had been so engaged, but defended on the theory that such products all were within the agricultural exemption. The Commission found each of these products not to be within the exemption, and ordered Frozen Food Express to cease and desist from such unauthorized transportation. The present proceeding was filed by Frozen Food Express to review that order.

While the present action was pending in this Court, the [fol. 229] Secretary of Agriculture of the United States filed

² Plaintiff has abandoned the contention that meat products are within the agricultural exemption, and this commodity will not be further considered here.

with the Commission his petition for leave to intervene, pursuant to Sec. 1291, of Title 7, U. S. C. A. This request was denied; and the Secretary appears here as "Intervening Plaintiff", contending (1) that the proceedings before the Commission were null and void by reason of the failure of the Commission to notify him of the pendency thereof (Sec. 1291(a), of Title 7, U. S. C. A.); (2) that the proceedings should be remanded to the Commission by reason of its error of law in having denied him leave to intervene; and (3) that the cease and desist order should be enjoined by reason of the alleged error of the Commission in holding fresh and frozen meats, and fresh and frozen dressed poultry, to be beyond the limits of the agricultural exemption.

The rail carriers and trucking associations which intervened in Civil Action 8285, also appear in this action. They support the Commission, and oppose the position taken by the plaintiff and the Secretary of Agriculture.

Armour & Company, being engaged at various points in the United States in the slaughter of livestock and the killing, dressing, and sale of poultry, has intervened, urging that dressed poultry is an exempt commodity, that meat is not.

The position taken by the Secretary of Agriculture that the proceeding before the Commission was null and void in its entirety by reason of the failure of the Commission to give him notice thereof, need not long detain us. The proceeding there was not one with respect to "rates, charges, [fol. 230] tariffs, and practices" relating to the transportation of farm products, and hence was not one of which the Secretary was entitled to notice under the statute (Secs. 1291 and 1622, of Title 7, U. S. C. A.). *U. S. v. Pa. R. R. Co.* (242 U. S. 208); *B. & O. R. R. Co. v. U. S.* (277 U. S. 292); *Mo. Pac. R. R. Co. v. Norwood* (283 U. S. 249). The Commission likewise did not commit an error of law in denying the Secretary's Petition of Intervention, filed there while the present proceeding was pending here.

Most able and exhaustive treatment is given the question now before us, in so far as it concerns dressed poultry, by Judge Graven of the United States District Court for the Northern District of Iowa, in *J. C. C. v. Kroblin* (113 F. Supp. 599, aff. 242 F. 2d 555, cert. den. Oct. 14, 1954). Re-

viewing the long struggle between the Interstate Commerce Commission in its efforts to restrict the application of the exemption in question, and the Department of Agriculture and others in seeking to expand it; reviewing the legislative history of the Motor Carrier Act of 1935, and various proposed amendments thereto; and considering the congressional intent which prompted the insertion of the agricultural exemption, Judge Graven concluded that dressed poultry constituted an "agricultural commodity", and did not constitute a "manufactured product thereof". Hence, such commodity was within the exemption. It is sufficient to state that we agree with those conclusions, as to fresh and frozen dressed poultry.

Counsel for the Commission urges that this Court should [fol. 231] disregard the *Kroblin* case, on the argument that the only question before us is one of the adequacy of the evidence before the Commission. It is said that the order which was entered was one within the general purview of the Commission's authority, and that if its findings are supported by "substantial evidence", this Court has no alternative but to leave it undisturbed. While we do not quarrel with such statement as a general proposition of law, the argument is not convincing in its application to the present record. The primary facts before the Commission were without dispute and were the subject of stipulation. Reduced to simplest form, they showed that before a chicken or duck became "dressed poultry": the bird was killed, his feathers and entrails removed, he was chilled, and in some cases frozen, packaged, etc. In addition, such "facts" consisted of evidence of so-called "expert" nature, that this treatment or processing of the chicken or duck rendered him a "manufactured product".

It is apparent that there is only one ultimate finding called for, namely, whether under the type of processing reflected by the record, the product falls within the statutory definition. The question then is a mixed one of law and fact, calling for the application of the processes of legal reasoning and of principles of statutory construction. The fact that the Commission's findings are supported by an "expert" who gives his opinion that a dressed chicken is a manufactured product, does not foreclose the question,

[fol. 232] nor remove it from the scope of judicial review. *Baumgartner v. U. S.* (322 U. S. 665); *Lehmann v. Acheson* (206 F. 2d 592, 30); *Galena Oaks Corp. v. Scofield*, (— F. 2d —, 50, Dec. 29, 1954, as yet unreported).

In our opinion, fresh and frozen meat does not fall within the category either of "ordinary livestock" or of "agricultural commodities", and hence is not within the exemption. Since the enactment of Part II of the Interstate Commerce Act in 1935, motor vehicles used exclusively in carrying "livestock, fish (including shell fish), or agricultural commodities (not including manufactured products thereof)", have been exempt. By amendment in 1940, the term "ordinary" was inserted immediately before the word "livestock". The term "ordinary livestock" is defined in Sec. 20(11) of the Act as "all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses".

Referring only to the live animals, "ordinary livestock" may not be tortured to include the carcasses of slaughtered meat animals, or the meat which is the product of butchering. Meat has been regarded generally in the industry as a controlled commodity for some twenty years. Congress has dealt with the agricultural exemption on many occasions. Considering the ease with which the Congress might have added appropriate language to evidence its intent to exempt fresh or frozen meat from Interstate Commerce Commission control, if it so desired, the absence of such language indicates that no such intent was entertained.

[fol. 233] Nor may meat, fresh or frozen, be considered an "agricultural commodity" for present purposes. The exemption has treated the live meat animal in a separate generic class from "agricultural commodity" since the enactment of the statute, and if the live animal, on entering the slaughter pen or the packing house, is not an "agricultural commodity", we are unable to see how he becomes one on emerging therefrom in the form of beef or pork. The Commission was correct, in our opinion, in holding fresh and frozen meat to be non-exempt.

The enforcement of the order of the Interstate Commerce Commission, MC-C-1605, *East Texas Motor Freight Lines, Inc., et al. v. Frozen Food Express*, is enjoined and re-

strained in so far as said order interfered with, enjoins or restrains the plaintiff Frozen Food Express from transporting fresh and frozen dressed poultry in interstate commerce (when the motor vehicles used in carrying such poultry are not used for carrying any other property or passengers for compensation). Other relief sought by plaintiff is denied.

Clerk will notify counsel.

Done at Houston, Texas, this 26th day of January, 1955.

(S.) Joseph C. Hutcheson, Jr., Chief Judge, Fifth Circuit; Ben C. Connally, United States District Judge; T. M. Kennerly, United States District Judge, concurring in part and dissenting in part.

[fol. 234] KENNERLY, District Judge, concurring in part and dissenting in part:

I concur with all the foregoing opinion except the decision in Civil Action 8396 with respect to fresh meat and frozen meat. As to that I respectfully dissent.

I think all of Section 303(b) should be given a broad and liberal construction, and that Section 303(b)(6) should be construed as including fresh meat and frozen meat. I think we should not only follow the reasoning of both the District Court and Court of Appeals in the *Kroblin* case with respect to dressed poultry and frozen dressed poultry, but that what is said is also applicable to fresh meats and frozen meats.

(S.) T. M. Kennerly, Judge.

[fol. 235]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF TEXAS, HOUSTON DIVISION

Civil Action No. 8285

FROZEN FOOD EXPRESS, ET AL., Plaintiffs,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COM-
MISSION, ET AL., Defendants

FINAL JUDGMENT—February 23, 1955

This action, to enjoin and set aside an order of the Interstate Commerce Commission, having come on for final hearing on November 16, 1954, before a duly constituted three-judge District Court, convened pursuant to Sections 2284 and 2321-2325, Title 28, United States Code, consisting of the undersigned judges; and the Court having considered the pleadings and evidence, and the briefs and arguments of counsel for the respective parties, and being fully advised in the premises; and having on January 26, 1955, filed herein its opinion, holding that the order sought by the plaintiffs to be set aside and enjoined is not an order subject to judicial review under any of the said statutes; now, in accordance with the said opinion, it is hereby

Ordered, adjudged, and decreed that the relief prayed for by the plaintiffs, including the Secretary of Agriculture as an intervening plaintiff, be, and the same hereby is, denied, and their complaints be, and the same hereby are, dismissed.

This the — day of February, 1955.

J. C. Hutcheson, Chief Judge, United States Court
of Appeals for the Fifth Circuit, — — —, United
States District Judge, — — — United States Dis-
trict Judge.

[fol. 236] APPROVAL OF FORM OF JUDGMENT

The undersigned, as attorneys of record for the respective parties to this action, hereby indicate their approval of the form of the annexed and foregoing judgment.

Carl L. Phinney, Attorneys for Frozen Food Express, Plaintiff, Walter D. Matson, Attorney for Ezra Taft Benson, Secretary of Agriculture, Intervening Plaintiff, James E. Kilday, Attorney for the United States of America, Defendant, Leo H. Pou, Attorney for the Interstate Commerce Commission, Defendant.

[fol. 237] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

NOTICE OF APPEAL BY CLASS I RAILROADS—Filed April 19,
1955

I

Notice is hereby given that the Class I railroads, a list of which is attached hereto, and made a part hereof, as Appendix A, intervening defendants in support of defendant Interstate Commerce Commission in the above-styled civil action, hereby appeal to the Supreme Court of the United States from the final judgment entered in this action on February 23, 1955.

This Appeal is taken pursuant to 28 U.S.C.A. 1253 and 2101(b).

[fol. 238]

II

It is agreed by the intervening defendant railroads appealing herein that the record on appeal shall consist of the transcript of the record as requested by the defendant Interstate Commerce Commission in its Notice of Appeal in this action, in which transcript the clerk will please include this Notice of Appeal.

The following question is presented by this appeal:

Whether the district court was in error in holding that the report of the Interstate Commerce Commission in No. MC-C-968, *Determination of Exempted Agricultural Commodities*, in which the Commission determined which of certain commodities could be transported within the exemption of Section 203(b)(6) of the Interstate Commerce Act (49 U.S.C.A. 303(b)(6)) and which could be transported only pursuant to operating authority, was not subject to judicial review, either as an "order" within the meaning of the Interstate Commerce Act or as interpretative rule making under the Administrative Procedure Act?

(S.) Margaret P. Allen, 1740 Suburban Station Building, Philadelphia 4, Pennsylvania, (S.) Edwin N. Bell, Esperson Building, Houston, Texas, (S.) Joseph H. Hays, 280 Union Station Building, Chicago 6, Illinois, (S.) Carl Helmetag, Jr., 1740 Suburban Station Building, Philadelphia 4, Penn-
[fol. 239-240] sylvania, (S.) James W. Nisbet, 280 Union Station Building, Chicago 6, Illinois, (S.) Charles P. Reynolds, Shoreham Building, Washington 5, D. C., Attorneys for Class I Railroads, Intervening Defendants.

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 241]

APPENDIX "A"

List of Class I Railroads

The below listed Railroads are the individual carriers which, together, are designated in the Notice of Appeal as "Class I Railroads," the intervening defendants appealing herein. When used, the term "Class I Railroads" includes each of these named Railroads:

Akron, Canton and Youngstown Railroad Company.
The Ann Arbor Railroad Company.

The Atchison, Topeka & Santa Fe Railway Company.
 Atlantic Coast Line Railroad Company.
 The Baltimore & Ohio Railroad Company.
 Bangor and Aroostook Railroad Company.
 Boston and Maine Railroad.
 Central of Georgia Railway Company.
 The Central Railroad Company of New Jersey.
 Chicago & Illinois Midland Railway Company.
 Chicago and Northwestern Railway Company.
 Chicago, Burlington & Quincy Railroad Company.
 Chicago Great Western Railway Company.
 Chicago, Indianapolis and Louisville Railway Company.
 Chicago, Milwaukee, St. Paul and Pacific Railroad Company.
 Chicago, Rock Island and Pacific Railroad Company.
 The Delaware and Hudson Railroad.
 The Delaware, Lackawanna and Western Railroad Company.
 The Denver and Rio Grande Western Railroad Company.
 The Detroit and Toledo Shore Line Railroad Company.
 Detroit, Toledo and Ironton Railroad Company.
 Duluth, South Shore and Atlantic Railway Company.
 (P. L. Solether, Trustee):
 Elgin, Joliet and Eastern Railway Company.
 Erie Railroad.
 Florida East Coast Railway Company (John W. Martin, Trustee).
 Fort Dodge, Des Moines & Southern Railway Company.
 Grand Trunk Railway System.
 Great Northern Railway Company.
 Green Bay & Western Railroad Company.
 Gulf, Mobile and Ohio Railroad Company.
 Illinois Central Railroad Company.
 The Kansas City Southern Railway Company.
 Lehigh and New England Railroad Company.
 Lehigh Valley Railroad Company.
 Main Central Railroad Company.
 Midland Valley Railroad Company.
 The Minneapolis & St. Louis Railway Company.
 Minneapolis, St. Paul & Sault Ste. Marie Railroad Company.

Missouri-Kansas-Texas Railroad Company.
 Missouri Pacific Railroad Company (Guy A. Thompson,
 Trustee).
 The Nashville, Chattanooga & St. Louis Railway.
 New York Central System.
 The New York, Chicago & St. Louis Railroad Company.
 The New York, New Haven & Hartford Railroad Com-
 pany.
 New York, Ontario and Western Railway.
 New York, Susquehanna and Western Railroad Com-
 pany.
 Norfolk and Western Railway.
 Northern Pacific Railway Company.
 [fol. 242] The Pennsylvania Railroad Company.
 The Pittsburgh and West Virginia Railway Company.
 Reading Company.
 St. Louis-San Francisco Railway Company.
 St. Louis Southern Railway Company.
 Seaboard Airline Railroad Company.
 Southern Railway Company.
 Southern Pacific Company.
 The Texas and Pacific Railway Company.
 Toledo, Peoria & Western Railroad.
 Union Pacific Railroad Company.
 The Virginian Railway Company.
 Wabash Railroad Company.
 Western Maryland Railway.
 The Western Pacific Railroad Company.

[fol. 243] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN
 DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

NOTICE OF APPEAL BY INTERSTATE COMMERCE COMMISSION—
 Filed April 20, 1955

I

Notice is hereby given that the Interstate Commerce
 Commission, a defendant in the above-styled civil action,

hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on February 23, 1955.

This appeal is taken pursuant to 28 U. S. C. 1253 and 2101(b).

II

The clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(a) Complaint filed June 14, 1954, by Frozen Food Express, plaintiff, including the certificates of public convenience and necessity attached thereto as exhibits;

[fol. 244] (b) Order of June 21, 1954, convening a three-judge court for trial of the case;

(c) Amended complaint filed July 12, 1954, including exhibits;

(d) Answer of Interstate Commerce Commission, defendant;

(e) Motion for leave to intervene filed by Ezra Taft Benson, Secretary of Agriculture;

(f) Order allowing intervention by Secretary of Agriculture;

(g) Complaint filed by the Secretary of Agriculture, as intervening plaintiff, including Appendices A, B, and C thereto;

(h) Answer of Interstate Commerce Commission to the complaint of the Secretary of Agriculture;

(i) Answer of United States of America, defendant;

(j) Motion for leave to intervene filed by American Trucking Associations, Inc.;

(k) Answer of American Trucking Associations, Inc., with leave of court thereon;

(l) Motion for leave to intervene as defendants, filed by Atchison, Topeka & Santa Fe Railway Company, et al.;

(b) Stipulation as to intervention by Atchison, Topeka & Santa Fe Railway Company, et al.;

(n) Order allowing intervention of Atchison, Topeka & Santa Fe Railway Company, et al.;

(o) Answer of Atchison, Topeka & Santa Fe Railway Company, et al.;

(p) Motion for leave to intervene as defendants, filed by Atlantic Coast Line Railroad, et al.;

(q) Order allowing intervention of Atlantic Coast Line Railroad, et al.;

(r) Answer of Atlantic Coast Line Railroad, et al.;

(s) Motion of Eastern Railroads for leave to intervene; [fol. 245] (t) Order allowing Eastern Railroads to intervene;

(u) Answer of Eastern Railroads;

(v) Motion for leave to intervene, and answer, filed by Common Carrier Irregular Route Conference of American Trucking Associations, Inc.;

(w) Order or notice setting the case for trial on November 16, 1954;

(x) Order of submission on November 16, 1954;

(y) Opinion of the Court, filed January 26, 1955;

(z) Final judgment, entered February 23, 1955;

(aa) This notice of appeal.

III

The following question is presented by this appeal:

Whether the district court was in error in holding the report and order of the Interstate Commerce Commission, made and entered April 13, 1951, in No. MC-C-968, *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511, was not an order subject to judicial review; the Commission having determined in the said proceeding that certain specified commodities are unmanufactured agricultural commodities and therefore within the exemption provided by section ~~205~~(b)(6) of the Interstate Commerce Act (49 U. S. C. ~~305~~(b)(6)); and also having determined therein that certain other commodities are manufactured products of agricultural commodities and therefore not within the said exemption, and that motor common and contract carriers are required to have operating authority issued by the Commission in order to transport [fol. 246] such products in interstate commerce for compensation?

(S.) Edward M. Reidy, General Counsel. (S.) Leo H. Pou, Assistant General Counsel, Attorneys for the Interstate Commerce Commission, Washington 25, D. C.

[fols. 247-248] CERTIFICATE OF SERVICE

(Omitted in printing)

[fol. 249] IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS—HOUSTON DIVISION

[Title Omitted]

NOTICE OF APPEAL BY FROZEN FOOD EXPRESS—Filed April
20, 1955

I

Notice is hereby given that Frozen Food Express, a corporation, complainant in the above-styled civil action, hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on February 23, 1955.

This appeal is taken pursuant to 28 U.S.C. 1253 and 2101(b).

II

The clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(a) Complaint filed June 14, 1954, by Frozen Food Express, complainant, including the certificates of public convenience and necessity attached thereto as exhibits;

(b) Order of June 21, 1954, convening a Three-Judge Court for trial of the case;

(c) Amended complaint filed July 12, 1954, including exhibits;

(d) Answer of Interstate Commerce Commission, defendant;

[fol. 250] (e) Motion for leave to intervene filed by Ezra Taft Benson, Secretary of Agriculture;

(f) Order allowing intervention by Secretary of Agriculture;

(g) Complaint filed by the Secretary of Agriculture, as intervening plaintiff, including Appendices A, B, and C thereto;

(h) Answer of Interstate Commerce Commission to the complaint of the Secretary of Agriculture;

(i) Answer of United States of America, defendant;

(j) Motion for leave to intervene filed by American Trucking Associations, Inc.;

(k) Answer of American Trucking Associations, Inc., with leave of court thereon;

(l) Motion for leave to intervene as defendants, filed by Atchison, Topeka & Santa Fe Railway Company et al;

(m) Stipulation as to intervention by Atchison, Topeka & Santa Fe Railway Company et al;

(n) Orders allowing intervention of Atchison, Topeka & Santa Fe Railway Company et al;

(o) Answer of Atchison, Topeka & Santa Fe Railway Company et al;

(p) Motion for leave to intervene as defendants, filed by Atlantic Coast Line Railroad et al;

(q) Order allowing intervention of Atlantic Coast Line Railroad et al;

(r) Answer of Atlantic Coast Line Railroad et al;

(s) Motion of Eastern Railroads for leave to intervene;

(t) Order allowing Eastern Railroads to intervene;

(u) Answer of Eastern Railroads;

(v) Motion for leave to intervene, and answer, filed by Common Carrier Irregular Route Conference of American Trucking Associations, Inc.;

[fol. 251] (w) Order or notice setting the case for trial on November 16, 1954;

(x) Order of submission on November 16, 1954;

(y) Opinion of the Court, filed January 26, 1955;

(z) Final judgment, entered February 23, 1955;

(aa) This notice of appeal.

III

The following question is presented by this appeal:

Whether the district court was in error in holding the Report and Order of the Interstate Commerce Commission, made and entered April 13, 1951, in No. MC-C-968,

Determination of Exempted Agricultural Commodities, 52 M.C.C. 511, was not an Order subject to judicial review; the Commission having determined in the said proceedings that certain specified commodities are unmanufactured agricultural commodities and therefore within the exemption provided by Section 203(b)(6) of the Interstate Commerce Act (49 U.S.C. 303(b)(6)); and also having determined therein that certain other commodities are manufactured products of agricultural commodities and therefore not within the said exemption, and that motor common and contract carriers are required to have operating authority issued by the Commission in order to transport such products in interstate commerce for compensation?

(Sd. Carl L. Phinney, Phinney and Hallman, 617 First National Bank Bldg., Dallas, Texas, Attorneys for Complainant, Frozen Food Express

[Fols. 252-253] CERTIFICATE OF SERVICE

[Omitted in printing]

[Fol. 254] SUPPLEMENTAL CERTIFICATE OF SERVICE BY CLASS
I: RAILROADS

[Omitted in printing]

[Fol. 255] IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT
BY AMERICAN TRUCKING ASSOCIATIONS, INC., COMMON CARRIER
CONFERENCE IRREGULAR ROUTE AND CONTRACT CARRIER
CONFERENCE THEREOF—Filed, April 22, 1955

I

Notice is hereby given that American Trucking Association, Inc., the Common Carrier Conference Irregular Route and the Contract Carrier Conference thereof, intervening

defendants in the above-captioned proceeding, hereby appeal to the Supreme Court of the United States from the final judgment rendered in this action on February 23, 1955.

This appeal is taken pursuant to Sections 1253 and 2101(b) of the Judicial Code, 28 U.S.C.A. §§ 1253 and 2101(b).

II

The designation of the portions of the record to be certified by the clerk contained in the Notice of Appeal filed by the Interstate Commerce Commission is adopted and hereby incorporated by reference.

III

The following question is presented by this appeal:

Did the United States District Court for the Southern District of Texas err in its judgment rendered February 23, 1955; dismissing the complaints filed in Civil Action No. 8285, *Frozen Food Express, et al. v. United States, et al.*, for the reason set forth in the Court's opinion filed January 26, 1955, that the order of the Interstate Commerce Commission, dated April 13, 1951, in Docket Number MC-C-968, *Determination of Exempted Agricultural Commodities*, sought by the plaintiffs to be set aside and enjoined, is not an order subject to judicial review under Section 205(g) of the Interstate Commerce Act, 49 U.S.C.A. § 305(g), Section 10 of the Administrative Procedure Act, 5 U.S.C.A. § 1009, and Sections 1336, 1398, 2284 and 2321 to 2325, inclusive, of the Judicial Code, 28 U.S.C.A. §§ 1336, 1398, 2284 and 2321-2325, although the Commission in said proceeding classified certain processed agricultural commodities as being embraced within the exemption of Section 203(b)(6) of the Interstate Commerce Act, 49 U.S.C.A. § 303(b)(6) and hence transportable by motor vehicles not subject to economic regulation by the Commission and classified other such processed agricultural commodities as being beyond the scope of the exemption of Section 203(b)(6) and thus able to be carried only in Commission-regulated motor vehicles?

Respectfully submitted: Rollo E. Kidwell, Callaway, Reed, Kidwell & Brooks, 301 Empire Bank Building, Dallas 1, Texas, Attorney for appellants, (S.)

Peter T. Beardsley, Fritz R. Kahn, 1424 Sixteenth Street, N. W., Washington 6, D. C., Attorneys for American Trucking Associations, Inc., (S.) Clarence D. Todd, Dale C. Dillon, Todd, Dillon and Curtiss, 944 Washington Building, Washington 5, D. C., Attorneys for Common Carrier Conference, Irregular Route and Contract Carrier Conference of American Trucking Associations, Inc.

[fol. 257] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 258] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 259] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—October 10, 1955

Appeals from the United States District Court for the Southern District of Texas.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted.

October 10, 1955.

(5229-0)

ORIGINAL

Office - Supreme Court, U. S.

FILED

JUN 17 1955

HAROLD B. WILLEY, Clerk

In the
Supreme Court of the United States

October Term, 1955

No. **158**

FROZEN FOOD EXPRESS

Appellant,

v.

**UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION,**

Appellees.

STATEMENT AS TO JURISDICTION

**PHINNEY AND HALLMAN,
CARL L. PHINNEY,
LEROY HALLMAN,
617 First National Bank
Building,
Dallas, Texas,
*Attorneys for Frozen Food
Express.***

In the
Supreme Court of the United States

October Term, 1955

No.

FROZEN FOOD EXPRESS,

Appellant,

v.

**UNITED STATES OF AMERICA and INTERSTATE
COMMERCE COMMISSION,**

Appellees.

STATEMENT AS TO JURISDICTION

In compliance with Rule 13, Paragraph 2, and Rule 15, of the Rules of the Supreme Court of the United States, as amended, Appellant submits herewith its jurisdictional statement.

(a)

Copies of the Opinion of the District Court for the Southern District of Texas, Houston Division, and Judgment are attached hereto as Appendix 1 and Appendix 2.

(b)

(1) Appellant, Frozen Food Express, sought a permanent injunction in the Court below restraining the enforcement, operation and execution of the orders of the Inter-

state Commerce Commission, and the cause is one required to be heard by a District Court of Three Judges (28 U. S. C. A. 2325 and 28 U. S. C. A. 2284).

(2) The judgment of the District Court was entered on February 23, 1955; notice of appeal was filed on April 20, 1955 in the District Court of the United States for the Southern District of Texas.

(3) The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b).

(4) The following decisions sustained the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States v. Capital Transit Company*, 325 U. S. 357; *United States v. Detroit and Cleveland Navigation Company*, 326 U. S. 236; *United States v. Pierce Auto Freight Lines*, 327 U. S. 515.

(5) Not applicable.

(c)

The following question is presented by this appeal:

Whether the District Court was in error in holding that the Report and Order of the Interstate Commerce Commission, made and entered April 13, 1951, No. MC-C-968, *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511, was not an order subject to judicial review; the Commission having determined in the said proceeding that certain specified commodities are unmanufactured agricultural commodities; and therefore within the exemption pro-

vided by Section 203 (b) (6) of the Interstate Commerce Act [29 U. S. C. (b) (6)]; and also having determined therein that certain other commodities are manufactured products of agricultural commodities and, therefore, not within the said exemption, and that motor common and contract carriers are required to have operating authority issued by the Commission in order to transport such products in interstate commerce for compensation?

(d)

STATEMENT OF THE CASE

Appellant, Frozen Food Express, is a common carrier by motor vehicle in interstate and foreign commerce and is the owner and holder of certificate of public convenience and necessity, MC-108207 issued by the Interstate Commerce Commission under the provisions of the Interstate Commerce Act, Parts I and II, authorizing the transportation of certain commodities between points and places in the states of Arizona, Arkansas, California, Colorado, Illinois, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, New Mexico, Oklahoma, Tennessee, Texas and Wisconsin.

Appellant has transported in the past, in addition to those commodities authorized it by the Interstate Commerce Commission as a common carrier motor carrier since the enactment of Part II of the Interstate Commerce Act, Title 49, 303 (b) (6), certain commodities consisting of agricultural commodities (not including manufactured products thereof) between various points in the United States. On

such occasions when the vehicles of appellant are transporting agricultural commodities, such motor vehicles are not transporting any other property or passengers for compensation or hire. Included in, but not limited to, such transportation, appellant has transported fresh meat, frozen meat, fresh, dressed poultry and frozen dressed poultry, it being the interpretation of appellant that said commodities are within the intendment of the broad exemption of agricultural commodities (not including manufactured products thereof), as specified in the Act.

On April 13, 1951, the Interstate Commerce Commission entered an order in docket No. MC-C-968 "*Determination of Exempted Agricultural Commodities*," which order very sharply restricted the definition of "agricultural commodities."

Appellant brought this action in the United States District Court of the Southern District of Texas, Houston Division, under Title 28, U. S. Code, Sections 1337, 1398, et seq., and Title 5, U. S. Code, Section 1009, appealing from such order of the Commission. The District Court refused to consider the appeal in Cause No. 8285, dismissing it on the grounds that the Report and Order of the Commission of April 13, 1951, were not a Report and Order subject to judicial review under any of the statutes cited.

(e)

NOT APPLICABLE . . .

(f)

The questions are substantial:

The question involved in this appeal is important in determining whether or not the Interstate Commerce Commission has the power and authority to enter the order complained of after Congress has specifically granted an exemption. The term "agricultural commodities" is not a term that is difficult of construction and appellant contends that by the entry of said order complained of in this appeal, the Interstate Commerce Commission has unlawfully usurped the power and authority of Congress and its acts are, therefore, void and unconstitutional. It is submitted that the decision of the United States District Court, holding that the order of the Interstate Commerce Commission of April 13, 1951, is not an "order" subject to judicial review under any of the statutes cited, leaves the appellant with the burden of securing injunctive relief against the Interstate Commerce Commission whenever it hauls or seeks to haul agricultural commodities (not including manufactured products thereof), and leaves undetermined the right of the Interstate Commerce Commission to restrict the term "agricultural commodities" after Congress had specifically exempted agricultural commodities from regulation under the Interstate Commerce Act, as amended.

(g)

NOT APPLICABLE

6
(h)

There is attached a copy of the Opinion of the lower Court delivered in connection with this cause. There were no Findings of Fact and Conclusions of Law separately made. Such Opinion is marked "Appendix 1."

(i)

~~A copy of the Judgment of the Court below is attached hereto and marked "Appendix 2."~~

Respectfully submitted,

CARL L. PHINNEY

PHINNEY AND HALLMAN,
617 First National Bank Building,
Dallas, Texas.


CARL L. PHINNEY
Of Counsel,

Attorneys for Appellant.

PROOF OF SERVICE

I, Carl L. Phinney, attorney for Frozen Food Express, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of June, 1955, I served copies of the foregoing Statement as to Jurisdiction on the several parties thereto as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with airmail postage prepaid, to James

E. Kilday and Charles S. Sullivan, Jr., Esquires, Special Assistants to the Attorney General, U. S. Department of Justice, Washington 25, D. C.; Malcolm R. Wilkey, Esq., U. S. Attorney, Federal Building, Houston, Texas; and by mailing a copy in a duly addressed envelope with airmail postage prepaid to The Solicitor General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission by mailing a copy, in a duly addressed envelope with airmail postage prepaid, to Edward M. Reidy and Leo H. Pou, Esquires, at the offices of the Interstate Commerce Commission, Washington 25, D. C.

3. On the following attorneys of record of the intervening complainants, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to Charles W. Bucey and Walter D. Matson, Esquires, U. S. Department of Agriculture, Washington 25, D. C.

4. On the following attorneys of record for the intervening defendants, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to Peter T. Beardsley and Fritz Kahn, Esquires, American Trucking Association, Inc., 1424 16th St. N. W., Washington 6, D. C.; to Rollo E. Kidwell, Esq.; 301 Empire Bank Bldg., Dallas, Texas; Lee Reeder, Esq., 1012 Baltimore Avenue, Kansas City 5, Missouri; James W. Nisbet, 280 Union Station Building, Chicago 6, Illinois; Charles P. Reynolds, Esq., Shoreham Building, Washington 5, D. C.; Carl Helmetag, Esq., Pennsylvania Railroad, 1740 Suburban Station Bldg., Philadelphia, Pa.; Edwin N. Bell, Esq., Esperson Bldg.,

Houston, Texas; J. C. Hutcheson, III, Esq., Esperson Bldg.,
Houston, Texas; Clarence D. Todd and Dale C. Dillon, Es-
quires, 944 Washington Bldg, Washington 5, D. C.

Carl L. Phinney

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Dallas, Texas,

*Attorneys for Frozen Food
Express.*

APPENDIX 1

In the
District Court of the United States
 For the Southern District of Texas
 Houston Division

Civil Action No. 8285 and Civil Action No. 8396

Frozen Food Express,

Plaintiff,

Ezra Taft Benson, Secretary of Agriculture of the
 United States,

Intervening Plaintiff,

v.

United States of America and Interstate Commerce
 Commission,

Defendants,

Common Carrier Irregular Route Conference of American
 Trucking Association, et al.,

Intervening Defendants.

Phinney and Hallman (Carl L. Phinney), of Dallas,
 Texas; for Plaintiff

Stanley N. Barnes, Ass't. Attorney General, and Charles W.
 Bucy, Associate Solicitor, of Washington, D. C.; for
 Intervening Plaintiff

Malcolm R. Wilkey, United States Attorney, of Houston,
 Texas, and Edward M. Reidy, Chief Counsel of Interstate
 Commerce Commission, of Washington, D. C.; for De-
 fendants

Callaway, Reed, Kidwell & Brooks (Rollo E. Kidwell), of Dallas, Texas;

Todd, Dillon & Curtiss (Clarence D. Todd), of Washington, D. C.;

Peter T. Beardsley, of Washington, D. C.

Baker, Botts, Andrews & Shepherd (J. C. Hutcheson, III, and Edwin N. Bell), of Houston, Texas;

MacLéay & Lynch (Francis W. McNery), of Washington, D. C.;

Reeder, Gisler & Griffin (Lee Reeder), of Kansas City, Missouri;

J. W. Nisbet, of Chicago, Illinois;

Carl Helmetag, Jr., of Philadelphia, Pa.

Rice, Carpenter & Carraway, of Washington, D. C.;

Fulbright, Crooker, Freeman, Bates & Jaworski (W. H. Vaughan, Jr.), of Houston, Texas; for Intervening Defendants

January 26, 1955

Before HUTCHESON, Chief Circuit Judge, and CONNALLY and KENNERLY, District Judges.

CONNALLY, District Judge:

Filed pursuant to Secs. 1336, 1398, and 2321-2325, of Title 28; to Sec. 1009, of Title 5; and to Sec. 305(g), of Title 49, U. S. C. A., each of the foregoing civil actions attacks and seeks to restrain enforcement of an order of the Interstate Commerce Commission. Presenting the same question of law, and substantial identity of parties, the actions were consolidated for hearing and trial. The question for determination is whether a number of different

commodities, as later noted herein, all of which have their origin on the farm or ranch, fall within the scope of the so-called agricultural exemption [Sec. 303(b)(6)] of Part II of the Interstate Commerce Act. (Title 49, U. S. C. A., Sec. 301, et seq.). By terms of the last-mentioned statute, motor vehicles used in carrying property consisting of "ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)," are exempt from Interstate Commerce Commission control (save for minor exceptions not here pertinent). The plaintiff, in each of the consolidated actions, being a trucking concern holding a certificate of convenience and necessity from the Commission, desires to carry some or all of the commodities in question, unrestricted by the terms of its own certificate, or by other Commission regulation. Hence the plaintiff, supported to a considerable extent in this contention by the Secretary of Agriculture of the United States, urges upon the Court a broad interpretation of the statutory language "agricultural commodities (not including manufactured products thereof)", which would have the net result of enlarging this so-called agricultural exemption. The Commission, on the other hand, and those intervenors who align themselves with the Commission, urge upon us that most of the commodities in question, by virtue of the treatment and processing which they receive, either have lost their identity as "agricultural commodities," or have become "manufactured products thereof." The result of this argument is drastically to restrict the scope of the exemption.

Civil Action 8285:

In June, 1948, the Interstate Commerce Commission, of its own motion, instituted a proceeding, being MC-C-968 on its docket, in the nature of an investigation, to determine the meaning and scope of the term "agricultural commodities (not including manufactured products thereof)," as used in the above-mentioned statute. The proceeding was widely noticed in the affected trades and industries. Many interested parties, including the Secretary of Agriculture of the United States, the Commissioners of Agriculture from a number of the States, associations of shippers, motor carriers, and others, intervened. After extended hearings, during which much expert testimony was offered as to the manner and method of cleaning, preparing, packaging, and otherwise processing the various commodities in question, the Commission issued its report and order entitled "Determination of Exempted Agricultural Commodities" (52 I. C. C. Reports, Motor Carrier Cases, 511-566). In such report, the Commission announced its definition of such statutory term,¹ which definition it then undertook to apply to the various commodities under consideration, and enumerated those which it found to come within the statutory language, and those which it found to

¹"In No. MC-C-968, we find that the term 'agricultural commodities (not including manufactured products thereof),' as used in section 203(b)(6) of the Interstate Commerce Act means: Products raised or produced on farms by tillage and cultivation of the soil (such as vegetables, fruits, and nuts); forest products; live poultry and bees; and commodities produced by ordinary livestock, live poultry, and bees (such as milk, wool, eggs, and honey), but not including any such products or commodities which, as a result of some treatment, have been so changed as to possess new forms, qualities, or properties, or result in combinations."

fall without. Thereupon, the proceeding was terminated and removed from the Commission docket.

The plaintiff Frozen Food Express was not a party to the proceeding before the Commission. By amended complaint filed here July 12, 1954, plaintiff alleges that it desires to carry agricultural commodities (not including manufactured products thereof) for hire, to and from all points within the United States, irrespective of the limitations imposed by its own certificate; that the report of April 13, 1951, deprives plaintiff of its right to do so. Alleging that the action of the Commission, in entering the report in question, was arbitrary, capricious and unreasonable, that it constituted an abuse of discretion and a violation of the Commission's statutory powers, the plaintiff here seeks an injunction to restrain the Commission and

"We find that the term 'agricultural commodities (not including manufactured products thereof),' as used in section 203(b) (6) includes: (1) fruits, berries, and vegetables which remain in their natural state, including those packaged in bags or other containers, but excluding those placed in hermetically sealed containers, those frozen or quick frozen, and those shelled, sliced, shredded, or chopped up; (2) fruits, berries, and vegetables dried naturally or artificially; (3) seeds, including inoculated seeds, but not seeds prepared for condiment use or those which have been deawned, scarified or otherwise treated for seedling purposes; (4) forage, hay, straw, corn and sorghum fodder, corn cobs, and stover; (5) (a) hops and castor beans, and (b) leaf tobacco, but excluding redried tobacco leaf; (6) raw peanuts, and other nuts, unshelled; (7) whole grains, namely, wheat, rye, corn, rice, oats, barley and sorghum grain, not including dehulled rice and oats, or pearled barley; (8) (a) cotton in bales or in the seed, (b) cottonseed and flaxseed, and (c) ramie fiber, flax fiber, and hemp fiber; (9) live poultry, namely, chickens, turkeys, ducks, geese, and guineas; (10) milk, cream, and skim milk, including that which has been pasteurized, standardized milk, homogenized milk and cream, vitamin 'D' milk, and vitamin 'D' skim milk; (11) wool and mohair, excluding cleaned and scoured wool and mohair; (12) eggs, including oiled eggs, but excluding whole or shelled eggs, frozen or dried eggs, frozen or dried egg yolks, and frozen or dried egg albumin; (13) (a) trees which have been felled and those trimmed, cut to length, peeled or split, but not further processed, and (b) crude resin, maple sap, bark, leaves, Spanish moss, and greenery; (14) sugar cane, sugar beets, honey in the comb, and strained honey."

the United States from enforcing or recognizing the validity of such report; restraining interference with the plaintiff's proposed transportation of such agricultural commodities (not including manufactured products thereof), and seeks an order of this Court declaring the report of the Commission of April 13, 1951, to be null and void.

The Secretary of Agriculture has intervened, denominating himself "Intervening Plaintiff." He makes common cause with plaintiff in contending that a number of commodities³ are within the exemption. Several trucking associations, and some sixty southern and western railroad companies, have intervened. These intervenors take a contrary view, and support the report of the Interstate Commerce Commission.

We are of the opinion that the action may not be maintained, and must be dismissed, for the reason that the report and order of the Interstate Commerce Commission of April 13, 1951, is not an "order" subject to judicial review under any of the statutes cited. The proceeding before the Commission was not an adversary one. The order which initiated it purported to do no more than direct that an investigation be made of the meaning of the statutory language. Notice was given only to the public. When the final report and order was forthcoming some two years later, the only "order" entered was one discontinuing the

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- ³"(1) Slaughtered meat animals and fresh meats;
 (2) Dressed and cut-up poultry, fresh or frozen;
 (3) Feathers;
 (4) Raw shelled peanuts and raw shelled nuts;
 (5) Hay chopped up fine;
 (6) Cotton linters and cottonseed hulls;
 (7) Frozen cream, frozen skim milk, and frozen milk;
 (8) Segs which have been deawned, scarified or innoculated."

proceeding and removing it from the Commission's docket. The question is controlled by *U. S. v. Los Angeles R. R. Co.* (273 U. S. 284), holding a very similar "order" of the Interstate Commerce Commission which found, after an investigation, the value of certain railroad properties, not to be subject to review. The language of Mr. Justice Brandeis, speaking for a unanimous Court there, aptly describes the order in issue here:

"The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation."

The proponents of jurisdiction here rely upon *Columbia Broadcasting System v. U. S.* (316 U. S. 407). It was there held that an order of the Federal Communications Commission promulgating certain rules and regulations requiring that the Commission deny a license to broadcasting stations under certain circumstances, was subject to judicial review, upon a showing by the complaining party of strong equitable considerations. This authority is clearly distinguishable from the present case. The order there in question was entered in the exercise of the agency's rule-

making power. Such orders, together with those fixing rates and those determining controversies before the administrative body, have long been recognized as subject to review (*U. S. v. Los Angeles R. R. Co.*, *supra*).

Likewise, the complaining party there showed an immediate and continuing threat of irreparable injury if the order were not reviewed. It is not so here. The statement of plaintiff that it desires to carry for hire most or all of the commodities on the Commission's proscribed list, and that it it does so, the Commission likely will seek injunctive relief to restrain plaintiff, shows no basis for the intervention of a court of equity. Plaintiff will have an adequate remedy in the event of such interference.

It follows that Civil Action 8285 will be dismissed.

Civil Action 8396:

A complaint was filed December 23, 1953, with the Interstate Commerce Commission by East Texas Motor Freight Lines, Gillette Motor Transport, Inc., and Jones Truck Lines, Inc., charging that Frozen Food Express was and had been engaged in transporting fresh and frozen dressed poultry, and fresh and frozen meats, and meat products, for hire, between points in interstate commerce not authorized by its certificate of convenience and necessity. Frozen Food readily admitted that it had been so engaged, but defended on the theory that such products all were within the agricultural exemption. The Commission found each of these products not to be within the exemption, and ordered Frozen Food Express to cease and desist from

such unauthorized transportation. The present proceeding was filed by Frozen Food Express to review that order.

While the present action was pending in this Court, the Secretary of Agriculture of the United States filed with the Commission his petition for leave to intervene, pursuant to Sec. 1291, of Title 7, U. S. C. A. This request was denied; and the Secretary appears here as "Intervening Plaintiff," contending (1) that the proceedings before the Commission were null and void by reason of the failure of the Commission to notify him of the pendency thereof [Sec. 1291 (a), of Title 7, U. S. C. A.]; (2) that the proceedings should be remanded to the Commission by reason of its error of law in having denied him leave to intervene; and (3) that the cease and desist order should be enjoined by reason of the alleged error of the Commission in holding fresh and frozen meats, and fresh and frozen dressed poultry, to be beyond the limits of the agricultural exemption.

The rail carriers and trucking associations which intervened in Civil Action 8285, also appear in this action. They support the Commission, and oppose the position taken by the plaintiff and the Secretary of Agriculture.

Armour & Company, being engaged at various points in the United States in the slaughter of livestock and the killing, dressing, and sale of poultry, has intervened, urging that dressed poultry is an exempt commodity, that meat is not.

Plaintiff has abandoned the contention that meat products are within the agricultural exemption, and this commodity will not be further considered here.

The position taken by the Secretary of Agriculture that the proceeding before the Commission was null and void in its entirety by reason of the failure of the Commission to give him notice thereof, need not long detain us. The proceeding there was not one with respect to "rates, charges, tariffs, and practices" relating to the transportation of farm products, and hence was not one of which the Secretary was entitled to notice under the statute (Secs. 1291 and 1622, of Title 7, U. S. C. A.). *U. S. v. Pa. R. R. Co.* (242 U. S. 208); *B. & O. R. R. Co. v. U. S.* (277 U. S. 292); *Mo. Pac. R. R. Co. v. Norwood* (283 U. S. 249). The Commission likewise did not commit an error of law in denying the Secretary's Petition of Intervention, filed there while the present proceeding was pending here.

Most able and exhaustive treatment is given the question now before us, in so far as it concerns dressed poultry, by Judge Gavin of the United States District Court for the Northern District of Iowa, in *I. C. C. v. Kroblin* (113 Supp. 599, aff. 212 F. 2d 555, cert. den. Oct. 14, 1954). Reviewing the long struggle between the Interstate Commerce Commission in its efforts to restrict the application of the exemption in question, and the Department of Agriculture and others in seeking to expand it; reviewing the legislative history of the Motor Carrier Act of 1935, and various proposed amendments thereto; and considering the congressional intent which prompted the insertion of the agricultural exemption, Judge Gavin concluded that dressed poultry constituted an "agricultural commodity," and did not constitute a "manufactured product thereof." Hence, such commodity was within the exemption. It is sufficient

to state that we agree with those conclusions as to fresh and frozen dressed poultry.

Counsel for the Commission urges that this Court should disregard the *Kroblin* case, on the argument that the only question before us is one of the adequacy of the evidence before the Commission. It is said that the order which was entered was one within the general purview of the Commission's authority, and that if its findings are supported by "substantial evidence," this Court has no alternative but to leave it undisturbed. While we do not quarrel with such statement as a general proposition of law, the argument is not convincing in its application to the present record. The primary facts before the Commission were without dispute and were the subject of stipulation. Reduced to simplest form, they showed that before a chicken or duck became "dressed poultry," the bird was killed, his feathers and entrails removed, he was chilled, and in some cases frozen, packaged, etc. In addition, such "facts" consisted of evidence of so-called "expert" nature, that this treatment or processing of the chicken or duck rendered him a "manufactured product."

It is apparent that there is only one ultimate finding called for, namely, whether under the type of processing reflected by the record, the product falls within the statutory definition. The question then is a mixed one of law and fact, calling for the application of the processes of legal reasoning and of principles of statutory construction. The fact that the Commission's findings are supported by an "expert" who gives his opinion that a dressed chicken is a manufactured product, does not foreclose the question, nor

remove it from the scope of judicial review. *Baumgartner v. U. S.* (322 U. S. 665); *Lehmann v. Acheson* (206 F. 2d 592, 3C); *Galena Oaks Corp. v. Scofield* (F. 2d , 5C, Dec. 29, 1954, as yet unreported).

In our opinion fresh and frozen meat does not fall within the category either of "ordinary livestock" or of "agricultural commodities," and hence is not within the exemption. Since the enactment of Part II of the Interstate Commerce Act of 195, motor vehicles used exclusively in carrying "livestock, fish (including shell fish), or agricultural commodities (not including manufactured products thereof)," have been exempt. By amendment in 1940, the term "ordinary" was inserted immediately before the word "livestock." The term "ordinary livestock" is defined in Sec. 20(11) of the Act as "all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses."

Referring only to the live animals, "ordinary livestock" may not be tortured to include the carcasses of slaughtered meat animals, or the meat which is the product of butchering. Meat has been regarded generally in the industry as a controlled commodity for some twenty years. Congress has dealt with the agricultural exemption on many occasions. Considering the ease with which the Congress might have added appropriate language to evidence its intent to exempt fresh or frozen meat from Interstate Commerce Commission control, if it so desired, the absence of such language indicates that no such intent was entertained.

Nor may meat, fresh or frozen, be considered an "agricultural commodity" for present purposes. The exemption

has treated the live meat animal in a separate generic class from "agricultural commodity" since the enactment of the statute; and if the live animal, on entering the slaughter pen or the packing house, is not an "agricultural commodity," we are unable to see how he becomes one on emerging therefrom in the form of beef or pork. The Commission was correct, in our opinion, in holding fresh and frozen meat to be non-exempt.

The enforcement of the order of the Interstate Commerce Commission, MC-C-1605, East Texas Motor Freight Lines, Inc., et al. v. Frozen Food Express, is enjoined and restrained in so far as said order interfered with, enjoins or restrains the plaintiff Frozen Food Express from transporting fresh and frozen dressed poultry in interstate commerce (when the motor vehicles used in carrying such poultry are not used for carrying any other property or passengers for compensation). Other relief sought by plaintiff is denied.

Clerk will notify counsel.

Done at Houston, Texas, this 26th day of January, 1955.

/s/ JOSEPH C. HUTCHESON, JR.,

Chief Judge, Fifth Circuit.

/s/ BEN C. CONNALLY,

United States District Judge.

/s/ T. M. KENNERLY,

*United States District Judge,
Concurring in Part and Dis-
senting in Part.*

APPENDIX 2

In the

United States District Court

Southern District of Texas

Houston Division

Civil Action No. 8285

Frozen Food Express, et al.,

Plaintiffs,

v.

United States of America,
Interstate Commerce Commission, et al.,*Defendants.*

JUDGMENT

This action, to enjoin and set aside an order of the Interstate Commerce Commission, having come on for final hearing on November 16, 1954, before a duly constituted three-judge District Court, convened pursuant to Sections 2284 and 2321-2325, Title 28, United States Code, consisting of the undersigned judges; and the Court having considered the pleadings and evidence, and the briefs and arguments of counsel for the respective parties, and being fully advised in the premises; and having on January 26,

1955, filed herein its opinion, holding that the order sought by the plaintiffs to be set aside and enjoined is not an order subject to judicial review under any of the said statutes; now, in accordance with the said opinion, it is hereby

ORDERED, ADJUDGED, AND DECREED that the relief prayed for by the plaintiffs, including the Secretary of Agriculture as an intervening plaintiff, be, and the same hereby is, denied, and their complaints be, and the same hereby are, dismissed.

This the day of February, 1955.

/s/ JOSEPH C. HUTCHESON, JR.,

*Chief Judge, United States
Court of Appeals for the Fifth
Circuit.*

/s/ BEN C. CONNALLY,

United States District Judge.

/s/ T. M. KENNERLY,

United States District Judge.

APPROVAL OF FORM OF JUDGMENT

The undersigned, as attorneys of record for the respective parties to this action, hereby indicate their approval of the form of the annexed and foregoing judgment.

/s/ CARL L. PHINNEY,

*Attorneys for Frozen Food
Express,*

Plaintiff.

/s/ WALTER D. MATSON,

*Attorney for Ezra Taft Ben-
son, Secretary of Agriculture;
Intervening Plaintiff.*

/s/ JAMES E. KILDAY,

*Attorney for the United States
of America,*

Defendant.

/s/ LEO H. POU,

*Attorney for the Interstate
Commerce Commission,*

Defendant.

TRUE COPY I CERTIFY

ATTEST:

V. BAILEY THOMAS, Clerk

By /s/ W. PAUL HARRISS

Deputy Clerk

(SEAL)

No. 158

In the
Supreme Court of the United States
OCTOBER TERM, 1955

FROZEN FOOD EXPRESS,

Appellant,

v.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,
Appellee.

*On Appeal from the United States District Court for the
Southern District of Texas, Houston Division*

BRIEF FOR THE APPELLANT

CARL L. PHINNEY,
617 First National Bank
Bldg.,
Dallas 2, Texas,
Counsel for Appellant.

Of Counsel:

PHINNEY AND HALLMAN,
Dallas, Texas.

Dated: December 30, 1955.

Due Date: January 4, 1956.

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In the
Supreme Court of the United States
OCTOBER TERM, 1955

FROZEN FOOD EXPRESS,

Appellant,

v.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,
Appellee.

*On Appeal from the United States District Court for the
Southern District of Texas, Houston Division*

BRIEF FOR THE APPELLANT

OPINION BELOW

The Opinion of the United States District Court for the Southern District of Texas, Houston Division (Three-Judge Court, January 26, 1955) (R. 104-109), is reported at 128 Fed. Supp., page 374.

JURISDICTION

The Judgment of the United States District Court for the Southern District of Texas, Houston Division, was entered January 26, 1955. (R. 104-109). Notice of Appeal was filed on April 20, 1955, in the District Court of the United States for the Southern District of Texas. The Jurisdiction of this Court rests on *Title 28, U. S. C., Sec. 1253* and *Sec. 2101(b)*.

QUESTIONS PRESENTED

Whether the District Court was in error in holding that the Report and Order of the Interstate Commerce Commission, made and entered April 13, 1951, No. MC-C-968, *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511, was not an order subject to judicial review; the Commission having determined in the said proceeding that certain specified commodities are unmanufactured agricultural commodities; and therefore within the exemption provided by Section 203(b)(6) of the Interstate Commerce Act [29 U. S. C. (b) (6)]; and also having determined therein that certain other commodities are manufactured products of agricultural commodities and, therefore, not within the said exemption, and that motor common and contract carriers are required to have operating authority issued by the Commission in order to transport such products in interstate commerce for compensation?

STATUTES INVOLVED

49 U. S. C. 303 (b) (6) provided as pertains to the issues involved in this case:

"Nothing in this Chapter, except the provisions of 304 of this Title relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property or passengers for compensation."

STATEMENT

Appellant, Frozen Food Express, is a common carrier by motor vehicle in interstate and foreign commerce and is the owner and holder of certificates of public convenience and necessity, MC 108207, issued by the Interstate Commerce Commission under the provisions of the Interstate Commerce Act, Part II, authorizing the transportation of certain commodities between points and places in the States of Arizona, Arkansas, California, Colorado, Illinois, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Nebraska, New Mexico, Oklahoma, Tennessee, Texas and Wisconsin.

Appellant has transported, in addition to those commodities it is authorized to transport by the Interstate Commerce Commission as a common carrier motor carrier, certain commodities consisting of agricultural commodities

(not including manufactured products thereof) between various points in the United States, as authorized by 49 U. S. C. 303(b) (6) between various points in the United States. On each of the occasions when the vehicles of Appellant were transporting agricultural commodities (not including manufactured products thereof), such motor vehicles were not used in carrying any other property or passengers for compensation. The items appellant transported consisting of agricultural commodities, included but were not limited to fresh meat, frozen meat, fresh dressed poultry and frozen dressed poultry.

On April 13, 1951, the Interstate Commerce Commission entered an order in Docket No. MC-C-968, entitled "*Determination of Exempted Agricultural Commodities*," 52 M. C. C. 511 (R. 30-102). Appellant brought this complaint in the Court below attacking this order of the Interstate Commerce Commission because the Interstate Commerce Commission had sharply restricted the right to transport agricultural commodities (not including manufactured products thereof) after Congress had specifically exempted agricultural commodities from regulation under the Interstate Commerce Act, as amended.

Appellant brought this action in the United States District Court for the Southern District of Texas, Houston Division, under *Title 28, U. S. C., Sections 1337, 1398, et seq.*, and *Title 5, U. S. C., Section 1009*. The District Court refused to consider the Appeal and dismissed it on the ground that the Report and Order of the Interstate Com-

merce Commission, dated April 13, 1951, was not a Report and Order subject to judicial review.

SUMMARY OF ARGUMENT

The provision "motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)" as employed in the statute is clear that Congress intended to exempt from regulation the named commodities. Here is a plain legislative purpose clearly expressed, and there is no room for application of the rules of ejusdem generis, or narrow construction. The Interstate Commerce Commission, by application of technical rules of construction, defeated the legislative intent, and the Court below should have found that the Determination Order of the Commission was beyond the Commission's powers and authority and should have been set aside.

ARGUMENT

I.

The historical background of the legislation demonstrates that Congress intended to exempt from the provisions of the Motor Carrier Act, Part II, Transportation for hire of commodities including agricultural and horticultural commodities (not including manufactured products thereof), and left no discretion to the Interstate Commerce Commission to designate what commodities are to be exempted.

Originally the Motor Carrier Act which was drafted by the late Charles F. Eastman was introduced by Senator Wheeler as S. 1629. The Committee on Interstate Commerce of the United States Senate reported the Bill out of the Committee by Senate Report 482, 79 C. R. 5485. The original Bill did not refer to the matter of exemptions. An amendment was placed in the Bill containing an exemption for "casual or occasional or reciprocal transportation" which was intended to exempt farmers and others who occasionally hauled for hire, 79 C. R. 5650, 5651 and 5652. The Senate passed a Bill with this exemption but without a specific exemption covering farmers or farm commodities, 79 C. R. 5737. After it was sent to the House of Representatives, it was reported by the House Interstate and Foreign Commerce Committee, accompanied by House Report 1645, 79 C. R. 11,813. That House Committee inserted an amendment which exempted "motor vehicles when used exclusively in carrying livestock or unprocessed agricultural products." The Bill was debated on the floor of the House on July 31, 1935, 79 C. R. 12,204-12,237. The agricultural exemption as it then existed was debated. Mr. Sadowski stated that "unprocessed farm commodities" meant "anything that has not been canned or manufactured or processed," and said it included cream and milk, 79 C. R. 12,205. At 79 C. R. 12,218, Mr. Jones said he expected to offer an amendment which would exempt "motor vehicle controlled and operated by any farmer and used in the transportation of his agricultural commodities and products thereof, or in the transportation of supplies to

his farms * * *". That this amendment would allow the farmer to haul his crop to market and haul his supplies back home. This was objected to on the ground that it was covered by the exemption of casual or occasional transportation. Mr. Pettengill then offered an amendment to the Committee amendment by striking out the words "unprocessed agricultural products" and inserting "agricultural commodities not including manufactured products thereof," 79 C. R. 12,220. Mr. Whittington proposed an amendment that would strike out any language that would give the Interstate Commerce Commission discretionary power to nullify certain exemptions of the Act. 79 C. R. 12,225. This was objected to on the grounds that the Interstate Commerce Commission should have the discretion relative to those exemptions in order to properly administer the Act. A substitute amendment for the one offered by Mr. Whittington was offered by Mr. Pettengill, 79 C. R. 12,226, that made the exemptions relative to agricultural commodities mandatory.

The Interstate Commerce Commission in the *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511, took cognizance of the fact that the exemption had broadened the scope of commodities that could be transported as exempt items. In its Order the Commission said in regard to the amendment above cited:

"The history of the legislation is not wholly clear as to the intent of Congress, except that the partial exemption was to aid the farmer. That the term in-

cludes, in addition to the raw farm products, commodities that have been treated or processed to an extent beyond such raw products state, is made plain by the explanation of the chairman of the subcommittee in charge of the legislation that the exemption was intended to cover pasteurized milk and ginned cotton. It is thus apparent that the Congress intended the exemption to extend to commodities produced by the farmer in the natural state and to a limited extent those further treated or processed. In the absence of any declaration by Congress as to what other commodities were to be embraced within the term, it is necessary to look to other sources."

52 M. C. C. 516-517.

There is little doubt that it was the deliberate intention of Congress in adopting the language in the amendment "agricultural commodities (not including manufactured products thereof)" to broaden the interpretation of unprocessed agricultural products and to allow certain agricultural products to be transported without the restriction of the regulation as applicable to other for hire operations under the Motor Carrier Act. It is a well established principle of law that an act should be interpreted as to attain the legislative goal:

"Words generally have different shades of meaning; and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed."

Puerto Rico v. Shell Company, 302 U. S. 253 and 258.

The Interstate Commerce Commission is thoroughly familiar with the fact that certain recommendations were made by the Commission to the Senate Committee on Interstate Commerce to place a more restricted meaning on the exemptions. These included that the exemptions would only apply on "agricultural products first movement from the point of production to the point of sale by the producer or to the point of manufacture or trans-shipment." Congress did not adopt such recommendation as offered by the Commission in regard to these particular items. We believe this failure to adopt such recommendation emphasizes our position to the effect that the statute term "agricultural commodities" is a broad term which includes processed agricultural commodities so long as they are not manufactured. See also *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349-353.

There also was introduced in the 81st Congress, H. R. 7547, which would have specifically limited the agricultural exemption in the case of poultry to "live poultry," but after extensive hearing, no action was taken on this Bill.

More recently in the 82nd Congress there was introduced Senate Bill 2357 which would have restricted the applicability of the agricultural exemptions to motor vehicles "controlled and operated by any farmer" and to come within the proposed exemption, the agricultural commodities could not have been "processed to a greater extent than is cus-

tomarily done by farmers," *Senate Hearing S. 2357*, page 425. This restriction was not adopted. Other clarifying amendments were adopted to correct the narrow interpretation of agricultural commodities, that the Commission had heretofore made particularly with respect to horticultural commodities.

It is appellant's belief that in order to give the effect that Congress intended, to-wit: a more liberal construction of the exemptions, that the term "agricultural commodities (not including manufactured products thereof)" must be applicable to fresh meat, frozen meat, fresh dressed poultry and frozen dressed poultry.¹

Likewise in the case of *Interstate Commerce Commission v. Allen E. Kroblin, Inc.*, 113 Supp. 599 (N. D. Iowa), the Court said:

"There are two features that stand out most predominantly in the voluminous legislative history relating to amendments made or proposed to Section 200(b)(6). One feature is that every amendment that Congress has made to it has broadened and liberalized its provisions in favor of exemptions, and the other feature is that although often importuned to do so,

¹Senate Report No. 1039, 82nd Cong. 1st Sess., p. 13, expresses the view that the agricultural exemption is for the "limited purpose of exempting from general regulation the farm-to-market or wharf-to-market transportation by motor carrier for the farmer or for the fisherman." However, that statement does not represent the view of any Congressional Committee. The foreword to the report specifically states that the issuance of the report is authorized "with reservations" and that the conclusions and recommendations which are extremely controversial * * * represent the views of the authors and have neither been approved nor disapproved by the Senate Committee on Interstate and Foreign Commerce." *Id.* at p. iii. Moreover, the report recognizes that the opinion expressed as to the scope of the agricultural exemption is contrary to the administrative and judicial interpretations of the agricultural exemption. *Id.* at p. 14.

Congress has uniformly and steadfastly refused or rejected amendments which would either directly or indirectly have denied the benefits of the exemptions contained therein to truckers who are engaged in operations similar to that of the defendant herein."

II.

The effect of the opinion of the Court below holding that the Report and Order of the Interstate Commerce Commission of April 13, 1951, is not an "Order" subject to judicial review leaves an area of confusion as to commodities that can be transported without regulation from the Interstate Commerce Commission and some specific definite and affirmative pronouncement should be made to clear up the uncertainty that now exists in motor transportation.

The motor carrier industry generally has regarded the Commission's decision in Docket MC-C-968 as restricting and defining the meaning and scope of the partial exemptions accorded by Section 203(b)(6).

In Docket No. MC-C-1605, *East Texas Motor Freight Lines, Inc., et al. v. Frozen Food Express (R38)*, the Interstate Commerce Commission said (R. 45):

"The facts before us in this proceeding are more complete as they relate to this particular issue than those before us in the *Exemption* case, but they contain nothing to warrant any different conclusions. On the contrary, they confirm the conclusions there reached."

Also the Commission found in Docket No. MC-C-1605 (R. 38, 45):

"Until a final decision contrary to the findings in the *Exemption* case is reached by the Courts, we adhere to the conclusion that the transportation of fresh and frozen meats and fresh and frozen dressed poultry are subject to the certificate and permit requirements of the Act."

Motor carriers who transport these commodities without authority have been prosecuted by the Interstate Commerce Commission for violating the Act, or the Interstate Commerce Commission has sought to enjoin their operations. Appellant was faced with the identical problem when it was notified by the Interstate Commerce Commission on the 13th of July, 1954 (see R. 47-48) that it was required within 45 days from the date of the Order to cease and desist from all motor carrier operations in interstate or foreign commerce of the character found to be unlawful. Appellant on the one hand is confronted with the interpretative rules and the declaratory orders of the Interstate Commerce Commission in the Exempt Commodity Order, and on the other the statement of the Trial Court that it is not a reviewable order. Appellant in its complaint (R. 4, 5) sought to enjoin the Interstate Commerce Commission from enforcing or recognizing the findings and order in the Determination case, inviting the Court's attention to the fact that the Commission was threatening to file complaints against it for transporting exempt commodities. The Court below (R. 55) found there was no basis for

the intervention of a Court of Equity and that complainant (appellant) would have an adequate remedy in the event of such interference. In other words the burden would be upon appellant to go back into a United States Federal District Court and seek injunctive relief against the Interstate Commerce Commission when it transported items and commodities held by the Commission not to be exempted in their finding and order of the Determination Case. This will have the inevitable result of a multiplicity of suits, both by individual motor carriers who seek to transport exempted commodities and by the Interstate Commerce Commission in bringing suits against individual motor carriers for injunctions or penalties as provided in Section 222(a) (b) of the Act, 49 U. S. C. 322(a) and (b).

The reviewability of the order entered by the Commission in Docket No. MC-C-968, *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511 (R, 32, 95), is authorized under the provisions of 5 U. S. C. 1009(a) which provides:

"Any person suffering legal wrong because of any agency action or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

49 U. S. C. 17(9) specifically provides for judicial relief from decisions, etc., of the Interstate Commerce Commission.

In *Columbia Broadcasting System v. U. S.*, 316, 407, the Federal Communications Commission after investiga-

tion issued a set of Rules which it stated it would follow in exercising its licensing power, but which its report characterized as an announcement of policy (316 U. S. 422). Plaintiff brought suit to enjoin the Commission's order, alleging among other things that the Communications Commission did not have authority to issue any such rules, and that their enforcement would cause it irreparable injury. (316 U. S. 408-409.) In its discussion of the reviewability of the Communication Commission's Order, the Court stated, 316 U. S. 417:

“* * * Such regulations which affect or determine rights generally, even though not directed to any particular person or corporation, when lawfully promulgated by the Interstate Commerce Commission, have the force of law and are orders reviewable under the Urgent Deficiencies Act. Assigned Car Cases (United States v. Berwind-White Coal Min. Co.), 274 U. S. 564, 71 L. Ed. 1204, 47 S. Ct. 727; United States v. Baltimore & O. R. Co., 293 U. S. 454, 79 L. Ed. 587, 55 S. Ct. 268. And regulations of like character, by which the Communications Commission has prescribed generally the records and accounts to be kept by telephone companies subject to its jurisdiction, are similarly reviewable under section 402(a). American Teleph. & Teleg. Co. v. United States, 299 U. S. 232, 81 L. Ed. 142, 57 S. Ct. 170.”

And the Court further said (316 U. S. 419-420):

“The purposes sought to be accomplished by section 402(a) and the Urgent Deficiencies Act would be defeated if a suitor were unable to resort to them to avoid reasonably anticipated irreparable injury resulting from such legal consequences of the Commis-

sion's order, merely because the Commission as yet has neither refused to renew a license, as the regulations require, nor cancelled a license, as the regulations permit. Such an argument addressed to the form rather than the substance of the order was rejected in *Powell v. United States*, 300 U. S. 276, 81 L. Ed. 643, 57 S. Ct. 470, *supra*; cf. *American Federation of Labor v. National Labor Relations Bd.*, *supra* (308 U. S. 408, 84 L. Ed. 351, S. Ct. 300). The *Powell Case* likewise repudiates the suggestion that merely because the order is not in terms addressed to those whose rights are affected, they cannot seek its review. See also *Western Pacific California R. Co. v. Southern P. Co.*, 284 U. S. 47, 76 L. Ed. 160, 52 S. Ct. 56; *Claihorne-Annapolis Ferry Co. v. United States*, 285 U. S. 382, 76 L. Ed. 808, 52 S. Ct. 440."

The Court concluded its opinion with the following statement (316 U. S. 425):

"* * * The ultimate test of reviewability is not to be found in an over-refined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control."

The *Columbia Broadcasting* case, *supra*, was decided prior to the enactment of the Administrative Procedure Act (5 U. S. C. 1001). The purpose and effect of that Act is well stated in *American President Lines v. Federal Maritime Board*, 112 F. Supp. 346 at 349:

"Before closing the discussion of this aspect of the litigation, it would seem pertinent to advert to the

fact that the Administrative Procedure Act is no mere codification of pre-existing law. If that were all that was accomplished by the enactment of this far-reaching statute, the prodigious labor that had been put into it, would have gone for naught. Contemporary discussion and debate clearly demonstrate that one of the main objectives of the Administration Procedure Act was to extend the right of judicial review. One of its purposes was to enlarge the authority of the courts to check illegal and arbitrary administrative action. The courts stand between the citizen and administrative officers. The statute created no new remedies but contemplated the use of established types of proceedings to achieve its ends. On the other hand, it broadened the scope of judicial review and it enlarged the class of persons who were given standing to invoke the judicial process. The doctrine of *Alabama Power Co. v. Ickes*, supra, is not applicable to proceedings under the Administrative Procedure Act. In the light of the foregoing considerations, the conclusion follows that the plaintiff has a standing to maintain this action."

Sections 2(a) and 4(c) of the Administrative Procedure Act (5. U. S. C. 1001(a) and 1003(c) give administrative agencies, including the Interstate Commerce Commission, power to make interpretative rulings. Sections 2(d) and 5(d) of that Act [5. U. S. C. 1001 (d) and 1004(d)] give the Commission power to make declaratory adjudications and orders. Section 5(d) reads as follows:

"(d) Declaratory orders.—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty."

In the *Attorney General's Manual on the Administrative Procedure Act* it is stated (p. 59) that:

"* * * For example, where an agency is authorized after hearing to issue orders to cease and desist from specified illegal conduct, it may, under Section 5(d), if it otherwise has jurisdiction, issue a declaratory order declaring whether or not specified facts constitute illegal conduct."

Section 10(a) of the *Administrative Procedure Act* [5 U. S. C. 1009(a)] gives the right of judicial review to "any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute." Section 10(b) [5 U. S. C. 1009(b)] provides that "The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute * * *."

The language of section 10(b) makes it clear that the Court below was the proper court to review the order assailed in the instant case. It is likewise clear that plaintiff is an aggrieved party within the meaning of the *Interstate Commerce Act* and the *Administrative Procedure Act* [49 U. S. C. 13(1), 28 U. S. C. 1336 and 2323]. See *Interstate Commerce Commission v. Oregon-Washington Railroad & Navigation Co.*, 288 U. S. 14, 23-25; *Chicago, St. P. M. & O. Ry. Co. v. United States*, 50 F. Supp. 249, affirmed 322 U. S. 1. ◊

In *Federal Communications Commission v. Sanders Bros.*, 309 U. S. 470, the Supreme Court had before it a

person aggrieved within the meaning of the Communications Act. Section 402(b) of this Act gives the applicant or "any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application," the right to appeal. The Court on page 477 of the Opinion made the following statement:

"Congress had some purpose in enacting section 402(b) (2). It may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license. It is within the power of Congress to confer such standing to prosecute an appeal."

Section 10(c) of the Administrative Procedure Act [5 U. S. C. 1009(c)] provides that "Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. * * *"

28 U. S. C. 1336 provides for judicial review of final orders of the Interstate Commerce Commission, and there can be no doubt of the fact that the order entered in Docket No. MC-C-968 was a final order. It was final because it ended the proceeding and because the very purpose of declaratory orders is "to terminate a controversy or remove uncertainty" [*5 U. S. C. 1004(d)*]. The fact that the order was a declaratory order does not affect its reviewability. *Section 5(d) of the Administrative Procedure Act*

provides that declaratory orders have "like effect as in the case of other orders."

In *El Dorado Oil Works v. United States*, 328 U. S. 12, 18 and 19, this Honorable Court held that the order of the Interstate Commerce Commission, being far more than an abstract declaration, and that legal consequences would follow which would finally fix a right or obligation, were more than a mere "stage in an incomplete process of administrative adjudication" and that the Order was reviewable by a District Court of Three Judges. In the *El Dorado* case as in the instant case the Interstate Commerce Commission discontinued further proceedings.

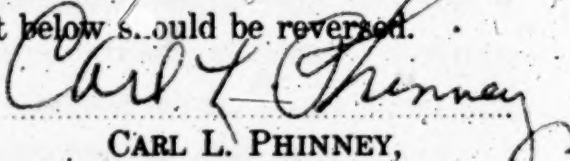
We submit, therefore, that the order of the Interstate Commerce Commission in the Determination of Exempted *Agricultural Commodities* is an appealable order and the Court below erred in not giving it that effect. We further feel that we are entitled to a judicial determination of the plain legislative intent of Section 203 (b) (6) of the Interstate Commerce Act.

In the absence of a judicial determination of the power and authority of the Interstate Commerce Commission to define commodities constituting agricultural commodities, an area of uncertainty, disagreement and confusion will continue to exist in the motor transportation industry. It will result in numerous lawsuits or prosecutions and suits for injunctions both by and against the Interstate Commerce Commission concerning the interpretation of the Commission's Order in the Determination case. Typical of such areas of dispute and disagreement are reflected in

Commerce Commission v. Yeary, 104 Fed. Sup., 245, 202 Fed. 2d 151 (C. C. A. 6); *Interstate Commerce Commission v. Kroblin*, 113 Fed. Supp., 599, 212 Fed. 2d 555 (C. C. A. 8), certiorari denied October 14, 1954; and *Frozen Food Express v. Interstate Commerce Commission*, 128 Fed. Supp., page 374, Three-Judge Statutory Court, United States District Court, Southern District of Texas, Houston Division. Congress refused to accept an amendment to the Motor Carrier Act which would give the Interstate Commerce Commission discretionary power to nullify certain exemptions of the Act, 79 C. R. 12,225. It adopted an amendment making the exemptions relative to agricultural commodities mandatory, 79 C. R. 12,226. We respectfully suggest, therefore, that the *Determination of Exempted Agricultural Commodities Order* is an appealable Order and that Congress having specifically refused to give the Interstate Commerce Commission any authority to nullify certain exemptions, that the Interstate Commerce Commission is without power and authority to enter any order that restricts or curtails the transportation of agricultural commodities (not including manufactured products thereof).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed.


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PROOF OF SERVICE

I, Carl L. Phinney, attorney for Frozen Food Express, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 30th day of December, 1955, I served copies of the foregoing Brief for Appellant on the several parties hereto as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with airmail postage prepaid, to James E. Kilday and Charles S. Sullivan, Jr., Esquires, Special Assistants to the Attorney General, U. S. Department of Justice, Washington 25, D. C.; Malcolm R. Wilkey, Esq., U. S. Attorney, Federal Building, Houston, Texas; and by mailing a copy in a duly addressed envelope with airmail postage prepaid to The Solicitor General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission by mailing a copy, in a duly addressed envelope with airmail postage prepaid, to Edward M. Reidy and Leo H. Pou, Esquires, at the offices of the Interstate Commerce Commission, Washington 25, D. C.

3. On the following attorneys of record of the intervening complainants, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to Charles W. Bucey, and Walter D. Matson, Esquires, U. S. Department of Agriculture, Washington 25, D. C.

4. On the following attorneys of record for the intervening defendants, by mailing copies in duly addressed

envelopes, with airmail postage prepaid, to Peter T. Beardsley and Fritz Kahn, Esquires, American Trucking Association, Inc., 1424 16th St. N. W., Washington 6, D. C.; to Rollo E. Kidwell, Esq., 305 Empire Bank Bldg., Dallas, Texas; Lee Reeder, Esq., 1012 Baltimore Avenue, Kansas City 5, Missouri; James W. Nisbet, 280 Union Station Building, Chicago 6, Illinois; Charles P. Reynolds, Esq., Shoreham Building, Washington 5, D. C.; Carl Helmetag, Esq., Pennsylvania Railroad, 1740 Suburban Station Building, Philadelphia, Pa.; Edwin N. Bell, Esq., Esperson Building, Houston, Texas; J. C. Hutcheson, III, Esq., Esperson Bldg., Houston, Texas; Clarence D. Todd and Dale C. Dillon, Esquires, 944 Washington Bldg., Washington 5, D. C.

Carl L. Phinney
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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 158

FROZEN FOOD EXPRESS, APPELLANT

v.

UNITED STATES OF AMERICA ET AL.

No. 159

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

FROZEN FOOD EXPRESS ET AL.

No. 160

AMERICAN TRUCKING ASSOCIATIONS, INC. ET AL., APPELLANTS

v.

FROZEN FOOD EXPRESS ET AL.

No. 161

AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY ET AL., APPELLANTS

v.

FROZEN FOOD EXPRESS ET AL.

No. 162

EAST TEXAS MOTOR FREIGHT LINES, INC. ET AL., APPELLANTS

v.

FROZEN FOOD EXPRESS ET AL.

No. 163

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

FROZEN FOOD EXPRESS ET AL.

No. 164

AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY ET AL., APPELLANT

v.

FROZEN FOOD EXPRESS ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 158

FROZEN FOOD EXPRESS, APPELLANT

v.

UNITED STATES OF AMERICA ET AL.

No. 159

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

FROZEN FOOD EXPRESS ET AL.

No. 160

AMERICAN TRUCKING ASSOCIATIONS, INC. ET AL., APPELLANTS

v.

FROZEN FOOD EXPRESS ET AL.

No. 161

AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY ET AL., APPELLANTS

v.

FROZEN FOOD EXPRESS ET AL.

No. 162

EAST TEXAS MOTOR FREIGHT LINES, INC. ET AL., APPELLANTS

v.

FROZEN FOOD EXPRESS ET AL.

No. 163

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

FROZEN FOOD EXPRESS ET AL.

No. 164

AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY ET AL., APPELLANTS

v.

FROZEN FOOD EXPRESS ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the specially constituted district court of three judges (R1. 104)¹ is reported at 128 F. Supp. 374. The report of the Interstate Commerce Commission in *Determination of Exempted Agricultural Commodities* (R1. 30), which is involved in Nos. 158-161, is reported at 52 M. C. C. 511. The Commission's report in *East Texas Motor Freight Lines, Inc. et al. v. Frozen Food Express* (R2. 6), which is involved in Nos. 162-164, is reported at 62 M. C. C. 646.

JURISDICTION

The final judgments of the district court in the two cases before it were entered on February 23, 1955 (R1. 114 and R2. 60). Notices of appeal were filed by the Interstate Commerce Commission (R1. 118 and R2. 65) and the other appellants on or before April 20, 1955. Jurisdiction of this Court is invoked under 28 U. S. C. 1253 and 2101 (b). Probable jurisdiction in both cases was noted on October 10, 1955, and the cases were then consolidated for hearing.

QUESTIONS PRESENTED

1. Whether the Commission's conclusions in *Determination of Exempted Agricultural Commodities* are subject to judicial review.
2. Whether the District Court erred in setting aside the Commission's cease and desist order in

¹ R1. refers to the printed record in Nos. 158-161; R2. to Nos. 162-164.

the *Complaint* case on the ground that fresh and frozen dressed poultry are exempt agricultural commodities under Section 203 (b) (6) of the Interstate Commerce Act.

STATUTES INVOLVED

The pertinent provisions of Part II of the Interstate Commerce Act, 49 U. S. C. 301 et seq., are as follows:

Sec. 203 (b) (6), 49 U. S. C. 303 (b) (6): Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment, shall be construed to include * * * (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), *agricultural* (including horticultural) *commodities* (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation * * *. [Emphasis added.]

Sec. 204 (c), 49 U. S. C. 304 (c): Upon complaint in writing to the Commission by any person, * * * the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with

any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. * * *

Sec. 206 (a), 49 U. S. C. 306 (a): * * * no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway * * * unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: * * *

STATEMENT OF THE FACTS

As already indicated, the several appeals now before this Court are from judgments entered by the district court in two separate but closely-related cases, in each of which the original plaintiff, Frozen Food Express, sued to set aside and enjoin enforcement of an order of the Interstate Commerce Commission.

In the first of the two cases, hereinafter referred to as the *Determination* case, not only the original plaintiff, but the Commission (as defendant), the intervening motor carrier defendants, and the intervening railroad defendants, have appealed from a judgment dismissing the complaint on the ground that the assailed order of the Commission is not subject to judicial review. These appeals are numbered 158, 159, 160 and 161, respectively.

In the other case, which we refer to as the *Complaint* case, the intervening motor carriers, the Commission, and the intervening railroads have appealed from a judgment enjoining and restraining the Commission from enforcing an order theretofore issued by it, insofar as the order required Frozen Food Express to cease and desist from transporting fresh or frozen dressed poultry in interstate commerce for compensation. The three appeals from this judgment are numbered 162, 163, and 164.

Following is a recitation of the proceedings before the Commission and a statement of the contentions of the several parties made in the district court in the two cases:

The Determination Case

In June 1948, the Commission, on its own motion, instituted an investigation into and concerning the meaning of the term "agricultural commodities (not including manufactured products thereof)" as used in Section 203 (b) (6) of the Interstate Commerce Act (49 U. S. C. 303 (b) (6)) (R1. 29).

By that section, as will be noted, motor vehicles used in carrying "agricultural commodities (not including manufactured products thereof)" are exempted from the provisions of the Act requiring a motor carrier engaged in interstate operations for compensation to have a certificate² of

² Section 206 (a).

public convenience and necessity as a common carrier or a permit as a contract carrier, also from the provisions as to rates and charges³ and those which require motor carriers to maintain and keep on file with the Commission bodily injury and property damage insurance⁵ for the protection of the public; that is, "if such motor vehicles are not used in carrying any other property, or passengers, for compensation." The result is that a carrier operating vehicles in carrying only "agricultural commodities (not including manufactured products thereof)" is not required to hold operating authority or to comply with the rate and insurance provisions in order lawfully to carry those commodities for compensation; but such a carrier is required to comply with all those provisions if he or it carries "manufactured products" of agricultural commodities for compensation.

The proceeding to determine the meaning of the quoted term was in due course assigned for hearing before a Commission examiner. The hearing was conducted at Washington, D. C., in November 1948, and at Atlanta, Ga., in January 1949, a total of nine days being required for receiving testimony and documentary evidence at the two places.

³ Section 209 (a).

⁴ Sections 217 (a) and 218 (a).

⁵ Section 215.

The Secretary of Agriculture of the United States, numerous State commissioners of agriculture and other State officials, various associations of producers and shippers, many individual motor carriers, and several associations of motor carriers, intervened in the proceeding, and, to varying extents, presented evidence at the hearing (R1. 32). Most of the evidence was in the form of testimony and exhibits presented by 11 scientists of the United States Department of Agriculture. The testimony of all the witnesses covers 1,509 transcript pages and the documentary evidence is included in 46 numbered exhibits.

The Commission's decision was issued on April 13, 1951, in the form of a report and order. The report covers 71 printed pages of the record (R1. 30-101). The order, which is the order assailed in this suit, incorporated the report by reference, including the findings and conclusions therein set forth (R1. 101). The principal conclusions (R1. 88) were as to the meaning of the term "agricultural commodities (not including manufactured products thereof)" and the principal findings (R1. 89) were as to certain commodities which are included in that term and as to certain others which are not.

The plaintiff below, Frozen Food Express, is a motor common carrier holding certificates issued by the Commission authorizing certain in-

terstate operations, including authority (R1. 6-16) to transport frozen meats, meat products, and dressed poultry from certain named points to certain other points. It alleged in its complaint (R1. 1) that it was and had been transporting these and other commodities between various points in the United States (not named in its certificates), and contended that it had the right to transport them without any authority issued by the Commission; it also alleged that they are agricultural commodities which the Commission in the *Determination* case held to be manufactured products of agricultural commodities. Paragraph III of the amended complaint (R1. 3) alleged that enumerated commodities, most of which the Commission had found to be non-exempt commodities, were exempt agricultural commodities as a matter of law, and that Frozen Food Express was being deprived of the "right granted to it under the laws of the United States" to transport such commodities exempt from regulation (R1. 5).

The Secretary of Agriculture, as intervening plaintiff, did not agree completely with the contentions of Frozen Food Express, as the Secretary listed only eight groups of commodities as to which he contended the Commission's findings and conclusions were erroneous and void. His

complaint (R1. 26) alleged that insofar as the report found and concluded that the eight groups were "neither ordinary livestock nor agricultural commodities" it was unsupported by adequate findings or substantial evidence (R1. 28).

In the answer (R1. 21) filed on behalf of the United States as a defendant, the Department of Justice took issue with Frozen Food Express as to certain commodities, and averred that as to them the Commission's order was "based on substantial evidence and valid." As to certain other commodities, however—and they are (with minor exceptions) the same eight groups complained of by the Secretary of Agriculture—the Justice Department's answer alleged that the Commission's findings were void because there was not substantial evidence in the record to support them (R1. 24).

Numerous motor carriers, associations, and railroads intervened and filed answers supporting the Commission's order.

The following table shows the finding of the Commission with respect to each of the commodities, or commodity groups, complained of by Frozen Food Express, also the contentions of the Departments of Agriculture and Justice with respect to each:

Commodities which Frozen Food Express or some other party contends are unmanufactured agricultural commodities and therefore exempt from regulation.

	Commission found	Agr. Dept. contends	Justice Dept. contends
Slaughtered meat animals and fresh or frozen meat.	Nonexempt	Exempt	Exempt.
Meat products	Nonexempt		Nonexempt.
Dressed and cut-up poultry, fresh or frozen.	Nonexempt	Exempt.	Exempt.
Feathers	Nonexempt	Exempt	Exempt.
Shelled eggs	Nonexempt		Nonexempt.
Frozen eggs	Nonexempt		Nonexempt.
Dried egg yolks	Nonexempt		Nonexempt.
Dried egg powder	Nonexempt		Nonexempt.
Cottage cheese	Nonexempt		Nonexempt.
Cream cheese	Nonexempt		Nonexempt.
Butter	Nonexempt		Nonexempt.
Buttermilk	Nonexempt		Nonexempt.
Vitamin D and pasteurized milk	Exempt		Exempt.
Skim milk	Exempt		Exempt.
Powdered milk	Nonexempt		
Condensed milk	Nonexempt		Nonexempt.
Frozen cream, frozen milk, and frozen skim milk.	Nonexempt	Exempt	Exempt.
Dehulled or polished rice	Nonexempt		Nonexempt.
Rolled or pearled barley	Nonexempt		Nonexempt.
Fresh vegetables, washed, cleaned, and packaged in cellophane.	Exempt		Exempt.
Fresh vegetables, cut-up, packaged in cellophane.	Nonexempt		Nonexempt.
Fruits and vegetables, quick-frozen.	Nonexempt		Nonexempt.
Canned fruits and vegetables.	Nonexempt		Nonexempt.
Dried fruits and vegetables, dried naturally or artificially.	Exempt		Exempt.
Peaches, peeled, pitted, and placed in cold storage in unsealed containers.	Nonexempt		Nonexempt.
Strawberries, canned in syrup in unsealed containers, and placed in cold storage.	(1)		Nonexempt.
Raw shelled peanuts and other shelled nuts.	Nonexempt	Exempt	Exempt.
Ground peanuts	Nonexempt		Nonexempt.
Coffee, ground or roasted	(1)		Nonexempt.
Cottonseed meal	Nonexempt		Nonexempt.
Cottonseed hulls and cotton linters	Nonexempt	Exempt	Exempt.
Beans, dried artificially, and packaged	No finding		Exempt.
Hay, chopped-up fine	Nonexempt	Exempt	Exempt.
Seeds which have been deawned or scarified.	Nonexempt	Exempt	Exempt.
Seeds which have been inoculated	Exempt		Exempt.
Redried tobacco leaf	Exempt		Exempt.

As to two commodities complained of by Frozen Food Express (Strawberries, canned in syrup, etc., and Coffee, ground or roasted), it does not appear that the Commission made specific findings. In view of its findings as to other commodities similarly treated, however, it is reasonable to assume that it would find that these two commodities are manufactured products and therefore nonexempt.

The Complaint Case

On December 23, 1953, three motor common carriers, East Texas Motor Freight Lines, Inc., Gillette Motor Transport, Inc., and Jones Truck Lines, Inc., acting under Section 204 (c) of the Interstate Commerce Act, filed with the Commission a complaint alleging that Frozen Food Express, a motor common carrier, was and had been engaged in transporting fresh and frozen meats, and fresh and frozen dressed poultry, in interstate commerce, to, from, and between points it was not authorized to serve under any certificate of public convenience and necessity issued to it by the Commission. The complainants prayed that the Commission, after appropriate investigation, issue an order requiring Frozen Food Express to cease and desist from engaging in such operations without authority.

In due time, the complainants and Frozen Food Express filed with the Commission a stipulation (R2. 71) and agreed that it should serve as the answer of Frozen Food Express, which therein admitted that it was and had been transporting fresh and frozen meats and fresh and frozen dressed poultry, as alleged by the complainants; but it asserted as a defense that such operations were within the exemption of Section 203 (b) (6) of the Act and might lawfully be performed without authority from the Commission.

The stipulation set forth the operating authorities of each of the complainants and of Frozen

Food Express (R2. 71); showed that each of them was authorized to transport the questioned products between certain named points in the United States; stated the facts as to a number of representative instances of transportation by Frozen Food Express of shipments of the named products (describing truckload shipments of each of the following: fresh beef, dressed poultry, veal trimmings, beef and mutton, cut-up poultry, and frozen turkeys) to and from points it was not authorized to transport such products (R2. 72); described in considerable detail the steps taken in converting livestock to fresh and frozen meats, and in converting live poultry to fresh and frozen dressed poultry (R2. 81); and set forth other evidence the parties considered relevant (R2. 73-87).

The parties having agreed that the facts as thus stipulated should constitute the evidence in the proceeding, and having filed briefs in support of their respective positions, the Commission took the matter under consideration and on July 13, 1954, rendered its decision, in the form of a report (R2. 6) and order (R2. 15). It there found that Frozen Food Express was and had been performing unauthorized operations in that fresh and frozen meats and fresh and frozen dressed poultry were not within the exemption provided in Section 203 (b) (6) of the Act, and ordered Frozen Food Express to cease and desist from engaging in such unauthorized operations.

The complaint (R2. 1) filed in the district court by Frozen Food Express, seeking to have the Commission's report and order set aside, alleged, among other things, that the Congress, by enacting Section 203 (b) (6) of the Act, "has specifically exempted agricultural commodities including fresh and frozen meats and fresh and frozen dressed poultry from the jurisdiction of the Interstate Commerce Commission" and that the report and order of the Commission constitute "an unlawful usurpation of the power and authority of the Congress of the United States." (R2. 4).

The answer of the United States (R2. 29) and the complaint in intervention filed by the Secretary of Agriculture (R2. 33) supported the position of Frozen Food Express, by asserting that the Commission's conclusions were in violation of Section 203 (b) (6) and were unsupported by substantial evidence. By answer (R2. 26, 48), the Commission denied these allegations.

The original complainants before the Commission (East Texas Motor Freight Lines, Inc., et al.) intervened in the district court in support of the Commission's report and order, as did other interested carriers and carrier associations. Those parties have joined the Commission in appealing from the judgment of the district court insofar as the judgment relates to fresh or frozen dressed poultry. As will be noted from the opinion, 128 F. Supp. 374, 380-381 (R2. 50, 58), the

district court sustained the Commission's conclusion that fresh and frozen meats are non-exempt commodities. No appeal has been taken from that holding.

SUMMARY OF ARGUMENT

I

The court below erred in holding, upon the authority of *United States v. Los Angeles & S. L. R. Co.*, 273 U. S. 299, that the Interstate Commerce Commission's report and order in *Determination of Exempted Agricultural Commodities* is not reviewable by the Federal courts. While the valuation order in that case did not threaten any person with direct consequences of governmental action until after further proceedings before the Commission, the Commission's action in the *Determination* proceeding confronts unauthorized (noncertificated) carriers which carry nonexempt commodities with the risk of civil and criminal sanctions, and authorized (certificated) carriers who carry such commodities without express authority from the Commission with the further threat of revocation of certificates.

The Commission's conclusions as to the commodities which are included within the exemption of Section 203 (b) (6) for "agricultural commodities (not including manufactured products thereof)" are reviewable under *Columbia Broadcasting Co., Inc. v. United States*, 316 U. S. 407, and *El Dorado Oil Works v. United States*,

328 U. S. 12. The fact that the Commission's report and order were not addressed to named persons and did not in terms require or prohibit action by anyone does not preclude review by the courts.

Viewed as interpretative rules, the Commission's conclusions in *Determination of Exempted Agricultural Commodities* are reviewable under *Federal Communications Commission v. American Broadcasting Co.*, 347 U. S. 284.

Even if the Commission's conclusions in the *Determination* case are not regarded as rules, they are reviewable as a declaratory order under Section 5 (d) of the Administrative Procedure Act. Since the *Determination* satisfies the requirements of Section 5 (d) for such a declaratory order, it is unimportant whether the Commission so labelled its action. The practical need for review of such administrative action is shown not only in the circumstances of the instant situation, but also in *Charles Noeding Co. v. United States*, 29 F. Supp. 537.

The constitutional requisite of a case or controversy will be satisfied if the *Determination of Exempted Agricultural Commodities* is subject to challenge only at the suit of persons who have such an interest in the matter as constitutes "standing to sue."

II

In the *Complaint* case, the court below erred in setting aside the Commission's order directing

Frozen Food Express, to cease and desist from unauthorized motor transportation of fresh and frozen dressed poultry, upon the ground that such dressed poultry is an exempted agricultural commodity under Section 203 (b) (6) of the Act.

In the *Complaint* case, the Commission did not rely solely upon its prior conclusion in the *Determination* case. In addition, it had before it substantial evidence which again showed that the conversion of live poultry to dressed poultry resulted in a manufactured food product, both in fact and in general understanding. The court below, relying heavily upon *Interstate Commerce Commission v. Krobin*, 113 F. Supp. 599, affirmed 212 F. 2d 555, certiorari denied 348 U. S. 836, decided as an original matter that fresh and frozen dressed poultry was not an exempt "agricultural commodity."

The Commission's contrary conclusion represented a reasonable application of Section 203 (b) (6) to facts rooted in substantial evidence. In the absence of statutory language or history repelling the Commission's conclusion, it should be sustained as a rational exercise of the Commission's responsibility to give effect, in the light of its continuing experience, to all of the purposes of the Interstate Commerce Act. *Levinson v. Spector Motor Co.*, 330 U. S. 649; *Gray v. Powell*, 314 U. S. 402; *10 East 40th St. v. Callus*, 325 U. S. 578; *O'Leary v. Brown-Pacific-Maxon*, 340 U. S. 504.

ARGUMENT

I

The Commission's Decision in Determination of Exempted Agricultural Commodities, 52 M. C. C. 511, Is Subject to Judicial Review

The court below dismissed the complaint on the ground that the report and order of the Commission is not an "order" subject to judicial review, citing *United States v. Los Angeles & S. B. R. Co.*, 273 U. S. 299. We submit that the court erred, in view of the nature of the Commission's decision and of later decisions of this Court.

Sections 206 and 209 of Part II of the Interstate Commerce Act (originally the Motor Carrier Act) prohibit interstate operation by motor common or contract carriers except as authorized by common carrier certificates of public convenience and necessity or motor carrier permits issued by the Commission pursuant to Sections 207 or 209. Where unauthorized operations occur, the Commission, acting under Section 204 (c) may issue an order requiring the carrier to cease and desist from such illegal operations. Under Section 212, wilful violation of such a cease and desist order is a ground for revocation of a certificate or permit. Section 222 (a) provides that any person knowingly and wilfully violating any provision of the Act shall, upon conviction, be fined not more than \$100 for the first offense and not

more than \$500 for any subsequent offense, and that "Each day of such violation shall constitute a separate offense." Section 222 (b) authorizes the Commission to apply to the district courts of the United States for injunctions restraining violations of the Act or of rules, orders, or certificates issued by the Commission.

Section 203 (b) contains various exemptions from all of the provisions of Part II except the provisions of Section 204 relating to "qualifications and maximum hours of service of employees and safety of operation or standards of equipment." One of the most important of these exemptions is that in Section 203 (b) (6) for "motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation."

The interpretation of this agricultural commodity exemption is of daily importance in the administration of the Act—both to the Commission and to the transportation industry. Both the Commission and motor carriers must know what operations are subject to the certificate and permit provisions of the Act. Unauthorized carriers (i. e., carriers without an appropriate certificate or permit) run the risk of incurring civil and criminal penalties if they transport non-exempt commodities. Authorized carriers who

carry non-exempt commodities in violation of their certificates or permits are threatened with revocation of their operating authorities. A carrier who desires to carry a commodity which may or may not be exempt needs to know whether he must undertake the expense and trouble of a proceeding to obtain an appropriate certificate or permit from the Commission, and whether, after he has acquired such authority and expensive and often specialized equipment (e. g., refrigerated trucks), he will be subject to unlimited competition from non-regulated carriers.

In 1948, the Commission on its own motion instituted an investigation "into and concerning the meaning of the term 'agricultural commodities' (not including manufactured products thereof)" as used in Section 203 (b) (6) of the Interstate Commerce Act." (R1. 29) As stated in the Commission's report (R1. 33), the institution of the investigation "stemmed from petitions filed by the Secretary of Agriculture and numerous agricultural interests" in *Harwood Contract Carrier Application*, 47 M. C. C. 597. Therefore, the Commission simultaneously reopened the *Harwood* case for further hearing on a consolidated record with the investigation proceeding (R1. 32).⁶ Generally, as the Commission's

⁶ In the *Harwood* case, the Commission applied the "channel of commerce" principle which it had evolved in earlier cases dealing with Section 203 (b) (6). In *Determination of Exempted Agricultural Commodities*, the instant case, the Commission rejected the "channel of commerce" principle (R1. 45-49).

report shows, the purpose of the investigation was to resolve uncertainties, and controversies both among shippers, carriers and among interested Federal and State agencies as to the scope of the exemption for "agricultural commodities (not including manufactured products thereof)."

The Commission's order instituting the investigation (R1. 29) was published in the Federal Register (13 F. R. 3492). In November 1948 and January 1949, hearings were held before a hearing examiner who received extensive evidence from representatives of the Department of Agriculture and other interested persons. Following a recommended report by the hearing examiner and oral argument before the Commission, the Commission issued the report and order involved here. The report consists of an extensive discussion of the evidence and of the history and purpose of Section 203(b) (6) and sets forth the Commission's determination as to whether each of many specified commodities is included in the exemption for "agricultural commodities." The order recites that "full investigation of the matters and things involved has been made, and that the Commission, on the date hereof has made and filed its report on oral argument herein containing its findings of fact and conclusions thereon, which report [and the Commission's report in the *Harwood* case, *supra*] are hereby referred to and made a part hereof,"

and ordered that the investigation proceeding be discontinued.¹

The plaintiffs in this case were Frozen Food Express and the Secretary of Agriculture. Frozen Food Express, a motor carrier, asserts (R1. 2-3) a right to transport without authorization from the Commission various commodities which the Commission, in its *Determination of Exempted Agricultural Commodities*, classified as nonexempt commodities. Plaintiff Frozen Food Express alleges that "the Commission is threatening to enjoin complainant's transportation of such exempted agricultural commodities (not including manufactured products thereof) and is threatening to file complaints against complainant and unless this Honorable Court enjoins and restrains the Interstate Commerce Commission from enforcing or recognizing the Determination of Exempted Agricultural Commodities Decision and Order that complainant will be deprived of the right granted to it under the laws of the United States" (R1. 5).

The plaintiff Secretary of Agriculture is authorized under Section 201 of the Agricultural Adjustment Act of 1938 (7 U. S. C. 1291) "to make complaint to the Interstate Commerce Commission with respect to rates, charges, tariffs, and practices relating to the transportation of farm products, and to prosecute the same before the

¹ The application in the reopened *Harwood* proceeding was denied because of non-prosecution by the applicant.

Commission." Also, under Section 201, in cases involving rates, charges, tariffs, and practices relating to the transportation of farm products, "the Secretary shall have the rights of a party before the Commission and the rights of a party to invoke and pursue original and appellate judicial proceedings involving the Commission's determination." The Secretary of Agriculture has challenged the Commission's *Determination* with respect to eight named commodities which the Commission concluded were not exempted agricultural commodities (*supra*, p. 10).^{*}

The court below, in holding *sua sponte* that the Commission's action in the *Determination* case was not reviewable, relied exclusively (R1. 108-109) upon the following language from *United States v. Los Angeles & S. L. R. Co.*, 273 U. S. 299, 309-310:

The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not

^{*} While the Commission has not questioned the standing of the Secretary of Agriculture to challenge its determination, the question of whether "practices" as used in Section 201 is limited to matters related to "rates, charges, tariffs" or whether it embraces such matters as the scope of the agricultural commodity exemption is not yet fully settled. See opinion of the court below at R1. 110.

change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation. * * *

We submit that the *Los Angeles & S. L. R. Co.* case is clearly distinguishable from the instant case. In that case, the valuation order involved would have no practical impact except in and following future rate or other proceedings before the Commission. Moreover, it was unpredictable in that case whether alleged errors in valuation would be significant in a future proceeding which might well involve factors other than value. As this Court noted (273 U. S. at 311), "it is at least possible that no proceeding will ever be instituted, either before the Commission or a court, in which the matters now complained of will be involved or in which the errors alleged will be of legal significance." By contrast, in the instant case, the Commission's formal conclusions as to the commodities which are or are not exempt agricultural commodities has an immediate practical impact upon carriers who are transporting or who desire to transport any of the commodities in question, as well as upon the shippers of such commodities who need to know now whether they are free to bargain with exempt carriers or

whether they must pay the filed charges of authorized carriers.

The situation in the *Los Angeles & S. L. R. Co.* case did not leave the carrier there involved threatened with criminal penalties. In the instant case, the Commission's decision in the *Determination* case warns every motor carrier who without authority from the Commission transports commodities which it has held to be exempt, that it does so at the risk of incurring criminal penalties under Section 222. Such a risk or threat has been regarded by this Court as a heavy factor in holding that action of the Commission is reviewable. *Shields v. Utah Idaho Central R. R.*, 305 U. S. 177. And see *A. F. of L. v. Watson*, 327 U. S. 582.

Still other decisions of this Court have qualified or explained the quoted language from the *Los Angeles & S. L. R. Co.* case. Thus, in *Columbia Broadcasting System, Inc. v. United States*, 316 U. S. 407, 416, it was emphasized that "The particular label placed upon [its order] by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive." That case involved the question of whether a broadcasting network could challenge the chain broadcasting regulations of the Federal Communications Commission which purported to restrict, under threat of refusal to renew station licenses, the freedom of individual stations to contract

with the network. In holding that the regulations were reviewable in a suit by the network, this Court pointed out (316 U. S., at 417) that "regulations which affect or determine rights generally, even though not directed to any particular person or corporation, when lawfully promulgated by the Interstate Commerce Commission, have the force of law and are orders reviewable under the Urgent Deficiencies Act. *Assigned Car Cases*, 274 U. S. 564; *United States v. B. & O. R. Co.*, 293 U. S. 454." See also *Powell v. United States*, 300 U. S. 276. *El Dorado Oil Works v. United States*, 328 U. S. 12, 18-19, illustrates that findings by the Interstate Commerce Commission may constitute a reviewable "order", although in form the Commission's order in that case merely directed that the proceeding be discontinued, as in the instant case, and did not prohibit or require action by any person. In that case, the Commission was exercising primary jurisdiction on an issue involved in a pending lawsuit between private parties, pursuant to this Court's decision in *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422.

More recently, in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 141, this Court noted that "We have long granted relief to parties whose legal rights have been violated by unlawful public action, although such action made no direct demands upon them." Accord-

ingly, in the instant case, we believe that it is not controlling that the Commission's *Determination* case did not require or prohibit action by any named person.

Also, the instant case is clearly distinguishable from the situations involved in *International Longshoremen's & Warehousemen's Union v. Boyd*, 347 U. S. 222, and *United Public Workers v. Mitchell*, 330 U. S. 75. In both of those cases, Federal courts were asked to interpret and invalidate acts of Congress or regulations by persons to whom those statutes were not yet applicable. Thus, in the *Boyd* case, resident aliens sought to learn in advance of going from the continental United States to work in the Alaska fisheries, whether under the Immigration and Nationality Act of 1952 they would be treated on their return as aliens entering the United States for the first time. In holding that their suit did not present a "case or controversy," this Court characterized the situation as follows (347 U. S., at 223-224):

Appellants in effect asked the District Court to rule that a statute the sanctions of which had not been set in motion against individuals on whose behalf relief was sought, because an occasion for doing so had not arisen, would not be applied to them if in the future such a contingency should arise.

In the instant case, in contrast, the correctness of the Commission's *Determination of Exempted Agricultural Commodities* is of immediate practical concern to every carrier, such as Frozen Food Express, which is carrying without authority from the Commission commodities which the Commission has determined to be non-exempt, as well as to competing authorized carriers, such as the appellant carriers in the companion *Frozen Food Express* case (Nos. 162-164).

If the Commission's conclusions in the *Determination of Exempted Agricultural Commodities* are viewed as interpretative rules, such a characterization does not make the *Determination* unreviewable by the courts. This Court has already held that Section 204 (a) (6) of Part II, of the Interstate Commerce Act⁹ (motor carriers) empowers the Commission to enforce the Act through the issuance of general rules. *American Trucking Assns. v. United States*, 344 U. S. 298, 311-312. Moreover, it is settled that such a statutory rule making power may be used to interpret and apply a prohibition which is stated in general terms in the statute itself, and that such interpretative rules may be reviewed by the courts under the Urgent Deficiencies Act. *Fed-*

⁹ Section 204 (a) (6) empowers the Commission "to administer, execute, and enforce all provisions of this part to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration."

eral Communications Commission v. American Broadcasting Co., 347 U. S. 284, 289-290. In that case, this Court reviewed regulations of the Federal Communications Commission interpreting the prohibition of 18 U. S. Code 1304 against broadcasting any "lottery, gift enterprise, or similar scheme," and providing that a policy or practice of violating the prohibition as thus interpreted would be ground for denial of the issuance or renewal of broadcasting licenses. In the instant case, the Interstate Commerce Commission has interpreted the statutory exemption for "agricultural commodities (not including manufactured products thereof)" for the purposes of its licensing functions.

However, we believe that it is not essential to treat the *Determination* as a rule in order to hold it reviewable. The reviewability of the Commission's interpretation as set forth in the *Determination* is not resolved by labelling it as a rule or an adjudication.

We do not urge that every interpretation of the Interstate Commerce Act by the Commission or its staff is or should be reviewable by the courts. Rather, we suggest that the line between non-reviewable interpretations and reviewable agency action is drawn by Section 5(d) of the Administrative Procedure Act, which provides that "In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, * * * (d)

the agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty." The Interstate Commerce Commission has jurisdiction to interpret and apply the agricultural exemption of Section 203 (b) (6) in two types of cases in which it is required to hold a hearing: (1) determining applications for certificates of public convenience and necessity or for contract carrier permits pursuant to Sections 207 and 209, and (2) issuing cease and desist orders under Section 204 (c) of the Act. It follows, therefore, that the Commission is authorized by Section 5 (d), after a hearing, to issue a declaratory order containing its conclusions as to the meaning and application of the agricultural commodity exemption of Section 203 (b) (6).

In the instant case, the Commission was not requested in terms to issue a declaratory order under Section 5 (d) of the Administrative Procedure Act; nor did it in terms profess to be issuing such a declaratory order. However, we submit that the significant thing is what the Commission actually did, rather than what it said or did not say as to what it was doing. What the Commission actually did, after a full hearing, was to make a formal determination as to the scope of the agricultural commodities exemption.

The fact that the Commission's Determination did not state whether a license should be issued or

denied or revoked is not controlling. *Columbia Broadcasting System, Inc. v. United States*, supra, at p. 419. Nor is it decisive that the Commission's Determination was not accompanied by a cease and desist order directed against a particular person. *Aetna Insurance Co. v. Haworth*, 300 U. S. 227.

Section 5 (d) of the APA, authorizing Federal administrative agencies to issue declaratory orders as to questions which they may otherwise determine after a hearing, was modelled upon the Declaratory Judgment Act of 1934. As such, it reflects the transition between *Liberty Warehouse Co. v. Grannis*, 273 U. S. 70 (decided less than two months before the *Los Angeles and S. L. R. Co.* case), holding that an Article III court had no jurisdiction to entertain the petition for a declaratory judgment, and *Aetna Insurance Co. v. Haworth*, supra, sustaining the Federal Declaratory Judgment Act of 1934.

Thus, the report of the Senate Committee on the Judiciary contains the following explanation of Section 5 (d) (Administrative Procedure Act, Legislative History, Sen. Doc. 248, 79th Cong., 1st Sess., p. 204):

Thus, such orders may be issued only where the agency is empowered by statute to hold hearings and the subject is not expressly exempted by the introductory clauses of this section.

Agencies are not required to issue declaratory orders merely because request is made therefor. Such applications have no greater effect than they now have under existing comparable legislation. "Sound discretion," moreover, would preclude the issuance of improvident orders. The administrative issuance of declaratory orders would be governed by the same basic principles that govern declaratory judgments in the courts.

The corresponding explanation in the report of the House Committee on the Judiciary (*Ibid* p. 263) adds that—

* * * They would be subject to judicial review as in the case of other orders.

Neither the language nor history of Section 5 (d) evidences a Congressional purpose to make reviewable all kinds of informal administrative interpretations. Rather, consciously using the Declaratory Judgment Act as a model, Congress restricted the authority to issue declaratory orders to situations or issues as to which the agency is otherwise authorized to hold hearings. When issued in such cases, "to terminate a controversy or remove uncertainty", Section 5 (d) provides that such orders are to have "like effect as in the case of other orders." Without more, this would mean that such orders are subject to judicial review. In any event, the report of the House Committee expressly states that "they would be subject to judicial review as in the case of other orders."

Accordingly, it must be as applicable to orders of the Commission as to orders of a District Court that—

Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. (*Aetna Insurance Co. v. Haworth*, 300 U. S., at 241.)

While the court below emphasized that “the only ‘order’ entered [by the Commission] was one discontinuing the proceeding and removing it from the Commission’s Docket”, we submit that this circumstance is irrelevant. It is simply the Commission’s procedural mechanics for terminating a formal proceeding which has resulted in a declaratory order under Section 5 (d) of the APA. *American Barge Line Co. Petition for a Declaratory Order*, 294 I. C. C. 796. See also *Arizona Sand & Rock Co. v. Southern Pac. Co.*, 280 I. C. C. 285. .

What the Commission did in the *Determination* case is strikingly similar, from the standpoint of judicial reviewability, to its action in *New York Commercial Zone*, 1 M. C. C. 665. Each proceeding was an investigation instituted by the Commission into the scope of a partial exemption from regulation provided by Section 203 (b) of

the Act. The *Determination* case was concerned with the agricultural exemption, subparagraph (6) of Section 203 (b); while the purpose of the *Commercial Zone* case was to define and prescribe the limits of the commercial zone of New York City, within the meaning of subparagraph (8) of the same Section 203 (b). Neither proceeding was an adversary one in the sense of a traditional lawsuit. In each, notice was given only to the public, and no carrier was named as a respondent. In neither case did the final order direct anything. Nevertheless, in *Charles Noeding Trucking Co. v. United States*, 29 F. Supp. 537, 543, a three-judge court, after a careful review of the reviewability problem, held that the Commission's order in the *Commercial Zone* case was subject to judicial review.

Admittedly, the "case and controversy" requirement of the Constitution means that not every one has standing to challenge the Commission's *Determination of Exempted Agricultural Commodities*. Thus, a person who is neither transporting nor seeking to transport a commodity which the Commission has determined to be non-exempt, is not entitled to challenge in the courts the Commission's classification of such commodity. An unauthorized carrier of dressed poultry on the Pacific coast presumably has no interest entitling him to challenge the Commission's *Determination* in so far as it relates to peanuts. Restricting the right to challenge all or

any part of the *Determination* to those persons who possess such an interest as would entitle them to challenge a Commission order granting or denying a common carrier certificate or a contract permit authorizing transportation of any of the commodities involved, or a cease and desist order prohibiting such transportation, would be consistent with the purpose of Congress in providing for administrative declaratory orders and would satisfy the constitutional requirement of a case or controversy.

We believe that compelling practical reasons support the view that the Commission's conclusions in the *Determination* are reviewable, subject to the limitations of the standing to sue doctrine. It is high time, 20 years after enactment of the Motor Carrier Act in 1935, that the scope of the agricultural commodity exemption was settled. If that question can be settled in one or a few cases challenging the correctness of the *Determination*, there will probably be avoided a considerable number of court proceedings as to the status of individual commodities. Since these cases would arise in many judicial districts, conflicting decisions would be inevitable, pending resolution by this Court. More important, early, consistent and authoritative determination of the scope of the agricultural commodity exemption will be of great practical value to thousands of shippers and certificated and uncertificated carriers who are involved in the transportation of

the commodities covered by the Commission's determination.

II

The District Court Erred in Setting Aside the Commission's Cease and Desist Order in the Complaint Case on the Ground That Fresh and Frozen Dressed Poultry Are Exempted Agricultural Commodities Under Section 203 (b) (6)

The Commission's order in the *Complaint* case directed Frozen Food Express to cease and desist from transporting fresh and frozen meats and fresh and frozen dressed poultry without appropriate authority from the Commission (R2. 15-16). The court below held that "fresh and frozen meat does not fall within the category either of 'ordinary livestock' or of 'agricultural commodities', and hence is not within the exemption" (R2. 58). No appeal was taken from this portion of the decision below. However, the court below also held, relying largely upon the decision in *Interstate Commerce Commission v. Kroblin*, 113 F. Supp. 599 (N. D. Iowa), affirmed 312 F. 2d 555, certiorari denied 348 U. S. 836, that fresh and frozen dressed poultry falls within the exemption for "agricultural commodities (not including manufactured products thereof)". The correctness of the latter holding is before this Court.

Prior to the Commission's decision in the instant *Complaint* case, the Commission had already held in *Determination of Exempted Agricultural Commodities* (involved in the companion case

Nos. 158-161) that fresh and frozen dressed poultry (and fresh and frozen meats) were not exempt commodities under Section 203 (b) (6). We submit that the Commission's decision as to fresh and frozen dressed poultry was correct for the reasons which it stated in both the *Determination* and the *Complaint* cases.

In the *Determination* case, the Commission made the general finding (R1. 88-89) that—

* * * the term "agricultural commodities (not including manufactured products thereof)" as used in section 203 (b) (6) of the Interstate Commerce Act means: Products raised or produced on farms by tillage and cultivation of the soil (such as vegetables, fruits, and nuts); forest products; live poultry and bees; and commodities produced by ordinary livestock, live poultry, and bees (such as milk, wool, eggs, and honey), but not including any such products or commodities which, as a result of some treatment, have been so changed as to possess new forms, qualities, or properties, or result in combinations.

In both the *Determination* and the *Complaint* cases, the Commission noted that Section 203 (b) (6) separately exempted "ordinary livestock" and "agricultural commodities (not including manufactured products thereof)", from which it concluded that these were separate exemptions so that "ordinary livestock" is not included in "agricultural commodities" etc. Looking to the

definition of "ordinary livestock" in Section 20 (11) as including "all cattle, swine, sheep, goats, horses, and anules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses," the Commission concluded (R1. 75-76; R2. 8-9, 12-13) that—

slaughtered animals are not embraced in the definition of ordinary livestock and we are impelled to conclude that the products thereof, such as fresh meat and meat products, do not fall within the description "agricultural commodities" as used in section 203 (b) (6). It logically follows that neither killed poultry nor any products thereof come within the term under consideration. We conclude that poultry other than that alive is not an agricultural commodity within the meaning of section 203 (b) (6).

However, the Commission did not rely solely upon this compelling analogy between dressed poultry and meat.

In the *Determination* case, the Commission had before it evidence as to the methods by which live poultry is converted into fresh and frozen dressed poultry (R1. 72-73). In the *Complaint* case, there was submitted by stipulation more detailed evidence which the Commission summarized as follows (R2. 10-11):

Chickens and other poultry intended to be used for food are raised on farms or by so-called "commercial broiler houses."

Poultry is raised on farms principally for the production of eggs. Their sale for killing is largely incidental to that production. The commercial broiler houses, on the other hand, are primarily engaged in producing poultry for food purposes. From three to four lots are usually raised and marketed during the course of a year. In most instances, chickens, turkeys, and other poultry are shipped alive from the farm or commercial broiler house [fol. 13] to the processing plant. Only a small percentage of the total number raised are killed and processed by the grower. The principal exceptions are the Long Island, N. Y., duck industry and certain growers' cooperatives, which carry on all operations incidental to the marketing of dressed poultry including the growing, killing, and processing.

In packing plants, the birds are first placed on an endless chain and then carried by the chain through the various stages of processing, which include killing, picking, pinning, singeing, cropping and venting, washing, chilling, eviscerating, packaging, and freezing. Picking is done both by machinery and by hand, the mechanical picker consisting of revolving drums equipped with rubber fingers. In some plants the removal of feathers is accomplished by the use of hot wax. The usual method of chilling is to place the carcasses in metal baskets which are then submerged in tanks of ice water long enough to remove

all body heat. In the eviscerating process, the body cavity is cut open and the viscera removed, with the liver, heart, and gizzard being cleaned and replaced in the carcass. The eviscerated poultry is then usually wrapped in waterproof paper and packed with ice in crates or barrels. Various methods of dry wrapping are also employed. The freezing of poultry must be accomplished as rapidly as possible and is generally done in a mechanically refrigerated room in which the temperature is maintained at minus 40 degrees Fahrenheit and the air is circulated at speeds up to 70 miles an hour. After the birds have been frozen by this quick-freeze method, they are placed in cold storage until ready for shipment.

The Commission's finding was also based upon substantial evidence that dressed poultry is generally regarded as a manufactured product, rather than an agricultural commodity. Thus, there was introduced in evidence a large number of U. S. Government bulletins (R2. 88-192), issued from time to time since 1929, in most of which dressed poultry is listed and classified, not as a farm or agricultural commodity, but as a food product or manufactured product. The first of these publications contained in the printed record is exhibit 5, entitled "Wholesale Prices of Commodities, January 1929", issued by the Department of Labor. It includes "live fowls" in the "farm products" classification (R2. 89), but lists

dressed poultry with beef, pork, and other "meats" in the "Foods" grouping (R2. 91).

Likewise, exhibit 6, entitled "Code for Industrial Classification" and issued by the National Recovery Administration in 1933, lists the growing of poultry under "Agriculture" (R2. 92), and classes "poultry killing, dressing, and packaging, wholesale" as "manufacturing" (R2. 74, 93). Exhibit 7, "Statistical Classification of Imports into the United States", issued by the Department of Commerce in 1933, lists "Birds, including poultry, dead, dressed or undressed" under the classification "Meat Products" (R2. 96). Exhibit 8 from the same publication lists "poultry killing, dressing, and packing, wholesale" among "industries" (R2. 98, 100).

It would unduly lengthen this brief to describe separately and in detail all the publications which are included in the record in this case, hence, we shall refer to only a few others. Exhibit 13, for example, is a "Standard Commodity Classification" issued by the Executive Office of the President in 1943. It lists "Poultry, Dressed: Fresh and Frozen" as a "Manufactured Food" (R2. 132); and a similar publication (exhibit 14) lists under "Manufacturing Industries" establishments "primarily engaged in killing, dressing, packing, and canning poultry" and adds that "Important products in this industry include dressed and packed poultry" (R2. 137). The same classification of dressed poultry as a manu-

factured product and the business of killing and dressing poultry as a manufacturing enterprise is shown in all the other documents of record down to and including exhibit 32 (R2. 174-191), which sets forth regulations prescribed by the Secretary of Agriculture effective May 15, 1953, governing the grading and inspection of poultry, both live and dressed.

Summarizing the evidence of record in the *Complaint* case, it shows (1) that the conversion of live poultry into "fresh and frozen dressed poultry" involves not merely killing the fowls, but numerous other steps necessary in dressing, eviscerating, cleaning, packing, and freezing them; (2) that these operations are not performed by farmers or on farms, but by wholesale packing companies at large processing or manufacturing plants; and (3) that Government publications, reflecting trade usages, have long treated the dressing and packing of poultry as a manufacturing process and both fresh and frozen dressed poultry as manufactured products. On this evidence, the Commission found that fresh and frozen dressed poultry were not "agricultural commodities" within the meaning of Section 203 (b) (6) of the Act, but were "manufactured products thereof", and ordered Frozen Food Express to cease and desist from transporting such products unless and until duly authorized by the Commission.

We believe it is obvious that the Commission's conclusion in the *Complaint* case that fresh and frozen dressed poultry were not exempt agricultural commodities was a permissible construction of the statute in the light of its findings supported by substantial evidence. The court below rejected this view of the Commission's function. Stating that "It is apparent that there is only one ultimate finding called for, namely, whether under the type of processing reflected by the record, the product falls within the statutory definition. The question then is a mixed one of law and fact, calling for the application of the processes of legal reasoning and of principles of statutory construction", the court below apparently decided the issue as an original matter while giving little or no weight to the Commission's conclusion.

We submit that in so doing, the court below erred. In *Levinson v. Spector Motor Co.*, 330 U. S. 649, 672, this Court said of similar determinations by the Commission that "As conclusions of law, these do not have the same claim to finality as do the findings of fact made by the Commission. However, in the light of the Commission's long record of practical experience with this subject and its responsibility for the administration and enforcement of this law, these conclusions are entitled to special consideration." See also *Gray v. Powell*, 314 U. S. 402, *N. L. R. B.*

v. *Hearst Publications*, 322 U. S. 111, and *O'Leary v. Brown-Pacific-Maxon*, 340 U. S. 504.

We believe that the error of the court below is highlighted by this Court's observations in *10 East 40th St. Co. v. Callus*, 325 U. S. 578, involving the question of whether certain office building employees were engaged in occupations "necessary to the production" of goods for commerce, so as to be within the overtime pay provisions of the Fair Labor Standards Act. In that case, this Court, speaking through Mr. Justice Frankfurter, pointed out (pp. 579-580) that unlike the Interstate Commerce Act, the Fair Labor Standards Act "puts upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations" [quoting from *Kirschbaum Co. v. Walling*, 316 U. S. 517, 523]. Thus, the opinion continued, "Congress withheld from the courts * * * the benefit of a prior judgment, on vexing and ambiguous facts, by an expert administrative agency" such as the Interstate Commerce Commission [citing authorities].

In the instant case, the proper scope of the agricultural exemption is not an abstract legal question. Rather it is an intensely practical question to be resolved in the light of all of the purposes of Part II of the Act (motor carriers) and of the Commission's experience in administering the Act. In *American Trucking Assn's*

v. *United States*, 344 U. S. 298, 317-318; this Court expressly recognized that the scope to be given to the agricultural commodity exemption must be determined in the context of the whole Act and its objectives.

Applying the principles laid down by this Court, we believe that the court below should have affirmed the Commission's order as having a rational basis in the Act and supported by substantial evidence.

While the court below largely based its decision upon *Interstate Commerce Commission v. Kroblin*, 113 F. Supp. 599 (N. D. Iowa), affirmed 212 F. 2d 555 (C. A. 8), certiorari denied 348 U. S. 836, we urge that the *Kroblin* decision is not persuasive in this case. To begin with, the denial of certiorari by this Court "imports no expression of opinion upon the merits of a case".¹⁰

Moreover, there is an important difference between the *Kroblin* case and the one now before the Court. The former was an enforcement action filed by the Commission seeking to have the district court (one judge) enjoin Kroblin from engaging in the transportation of dressed poultry without authority. The very nature of the action required the court to find the facts. In the *Complaint* case against Frozen Food Express, how-

¹⁰ *House v. Mayo*, 324 U. S. 42, 47; also *Griffin v. United States*, 336 U. S. 704, 716; *Sunol v. Large*, 332 U. S. 174, 181; *Brown v. Allen*, 344 U. S. 443, 456.

ever, the Commission was the primary fact-finding body, and its conclusions must be sustained by the reviewing court if authorized by law and supported by substantial evidence. *10 East 40th St. Co. v. Callus*, supra.

Finally, it should be noted that in the *Kroblin* case, the lower court decisions gave great weight to the circumstance that various legislative proposals (some initiated or supported by the Commission) for amending Section 203 (b) (6) so as to narrow the agricultural commodity exemption, had failed of enactment by Congress. We contend that this was a mistaken emphasis. As this Court stated in *Wong Yang Sung v. McGrath*, 339 U. S. 33, 47, "we will not draw the inference * * * that an agency admits that it is acting upon a wrong construction by seeking ratification from Congress. Public policy requires that agencies feel free to ask legislation which will terminate or avoid adverse contentions and litigations." Leaving aside such abortive legislative efforts, we submit that neither language nor the affirmative legislative history of Section 203 (b) (6) (as set forth and discussed in the Commission's report in *Determination of Exempted Agricultural Commodities* (R1. 35-49)) is so clear as to warrant the courts in the *Kroblin* case or the court below in the instant case, from giving little or no weight to the Commission's construction and application of the Act.

CONCLUSION.

For the reasons set forth above, the judgment of the district court in each of these cases should be reversed. The *Determination* case (Nos. 158-161) should be remanded to the district court for review of the Commission's action, while the *Complaint* case (Nos. 162-164) should be remanded with direction to enter a judgment dismissing the complaint.

Respectfully submitted,

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No. 159

In the Supreme Court of the United States

OCTOBER TERM, 1955

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

FROZEN FOOD EXPRESS ET AL., APPELLEES

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS**

STATEMENT AS TO JURISDICTION

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STATEMENT AS TO JURISDICTION

The Interstate Commerce Commission, appellant, submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Texas is reported at 128 F. Supp. 374, and a copy is attached hereto as Appendix A. A copy of the final judgment of the District Court is attached hereto as Appendix

B. The decision of the Interstate Commerce Commission is reported at 52 M. C. C. 511. A copy of the Commission's order entered in conformity with its decision is attached hereto as Appendix C.

BASIS OF JURISDICTION

This suit was brought by Frozen Food Express, a motor common carrier of property, to set aside and enjoin enforcement of an order of the Interstate Commerce Commission. The judgment of the District Court was entered on February 25, 1955, and notice of appeal was filed in that court by the Commission on April 20, 1955.

The jurisdiction of the Supreme Court to review the decision of the District Court on direct appeal is conferred by 28 U. S. C. 1253 and 2101 (b), and is sustained by the following cases: *United States v. Pierce Auto Freight Lines*, 327 U. S. 515; *Interstate Commerce Commission v. Parker*, 326 U. S. 60; *American Trucking Assns. v. United States*, 344 U. S. 298; *United States v. Capital Transit Co.*, 338 U. S. 286.

STATUTES INVOLVED

The pertinent portions of Part II of the Interstate Commerce Act, 49 U. S. C. 301 et seq., are as follows:

Sec. 203 (b) (6), 49 U. S. C. 393 (b) (6):

Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees

and safety of operation or standards of equipment, shall be construed to include * * * (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), *agricultural* (including horticultural) *commodities* (*not including manufactured products thereof*), if such motor vehicles are not used in carrying any other property, or passengers, for compensation * * *. [Emphasis added.]

Sec. 206 (a), 49 U. S. C. 306 (a): * * * no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway * * * unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: * * *.

QUESTION PRESENTED

The only question presented by this appeal is whether the District Court was in error in holding that the order of the Interstate Commerce Commission assailed by the plaintiff was not an order subject to judicial review in a suit of this type.

STATEMENT OF THE CASE

In June 1948 the Commission instituted an investigation¹ into and concerning the meaning of

¹ Docket No. MC-C-968, *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511, hereinafter sometimes referred to as "the Determination case."

the term "agricultural commodities (not including manufactured products thereof)" as used in section 203 (b) (6) of the Interstate Commerce Act, 49 U. S. C. 303 (b) (6). By the terms of that section, which is copied on page 2 hereof, motor vehicles used in carrying such "agricultural commodities" are exempted from the provisions of the Act requiring a motor carrier engaged in interstate transportation for compensation to have operating authority,² to publish and file rates,³ and to keep in force and on file with the Commission insurance⁴ for the protection of shippers and the general public. The result is that if a motor carrier is engaged in the transportation of "agricultural commodities" only, he is not required to comply with the authority, rate, and insurance provisions; but he is required to comply with them if he transports "manufactured products" of agricultural commodities.

Following a nine-day hearing,⁵ participated in by representatives of the Secretary of Agriculture, numerous State officials, various associations of producers and shippers, and many individual motor carriers, and after submission of the examiner's recommended report, the filing and consideration of briefs and oral argument, the Com-

² Section 206 (a) and 209 (a).

³ Sections 217 (a) and 218 (a).

⁴ Section 215.

⁵ The evidence received at the hearing consists of 1500 pages of testimony and 46 exhibits.

mission issued its report (52 M. C. C. 511), dated April 13, 1951. On the same date it entered an order incorporating the report by reference, including the findings and conclusions therein set forth, and then discontinuing the proceeding.

In its report the Commission first determined the meaning of the statutory language, "agricultural commodities (not including manufactured products thereof)", and then made specific findings as to a large number of named commodities and products, specifying as to each of them whether it was found to be an agricultural commodity or a manufactured product of an agricultural commodity. It based its findings on the evidence in the record, as shown by the full discussion thereof set forth in the report.

• The complaint filed in the District Court by Frozen Food Express alleges, among other things, that it is a motor common carrier engaged in the for-hire transportation in interstate commerce of certain agricultural commodities^o which the Commission in the *Determination* case found were manufactured products; also alleging that it required no operating authority for performing said transportation but that the Commission in

^o The complaint alleged that the commodities being transported included, but were not limited to, slaughtered cattle, fresh meat, meat products, frozen whole eggs, dried egg powder, dried egg yolks, cottage cheese, cream cheese, quick-frozen fruits and vegetables, canned fruits and vegetables (and numerous other named commodities).

the *Determination* case had erroneously held that operating authority was required in order for a motor carrier to transport the named articles, thereby depriving Frozen Food Express of its right under the statute to engage in such transportation without first obtaining authority therefor; also alleging that the Commission ~~was~~ threatening to enjoin Frozen Food Express from engaging in such transportation and was threatening to file complaints against it to enforce the determinations made by the Commission in the *Determination* case. The complaint demanded that the District Court annul the Commission's order and enjoin its enforcement.

The Secretary of Agriculture intervened in the suit in partial support of the position of Frozen Food Express, and in doing so was joined by the Department of Justice. Numerous motor carriers, motor carrier associations, and groups of railroads intervened in support of the Commission's order. All parties (plaintiffs, defendants, and intervenors) were in agreement and urged the District Court to hold that the assailed order was a reviewable order. The Court nevertheless held that the order was not reviewable, and dismissed the complaint, thus refusing to pass upon the Commission's findings and determinations. From that decision separate appeals have been taken by the original plaintiff, Frozen Food Express, by the Commission as a defendant, by the interven-

ing motor carriers, and by the intervening railroads, all of the appellants contending that the order is reviewable and that the District Court was in error in holding otherwise.

**THE QUESTION PRESENTED IS SUBSTANTIAL
AND IS OF PUBLIC IMPORTANCE**

The Commission is appealing from the decision of the District Court and seeking a reversal thereof, notwithstanding the fact that the decision was in a narrow and technical sense in favor of the Commission, in that it resulted in the dismissal of a complaint filed against the Commission. The Commission views the decision in its broader aspect, however, and so viewing it, feels aggrieved by it. It is greatly to the interest of the Commission, in the performance of its statutory duty "to administer, execute, and enforce" all provisions of the statute, 49 U. S. C. 304 (a). (6), that the assailed order and the findings and conclusions incorporated in it be judicially reviewed and either annulled or sustained. Such a judicial review, with a court decision as to the legality of the Commission's numerous findings and determinations as to the commodities which are within and those which are without the statutory exemption, would enable the Commission intelligently and authoritatively to discharge its duties and responsibilities. It would then *know* which commodities and products require operat-

ing authority for their interstate transportation, and which do not; it would know which motor carriers are operating within the scope of their authorities and which are operating without authority and in violation of the statute.

If, on the other hand, the Commission's order, including as it does its findings and conclusions as to the several commodities and products, is not subject to judicial review, the legality of those findings and conclusions can be determined only in piecemeal fashion, in a multitude of separate criminal prosecutions or civil injunctive actions instituted under sections 222 (a) or 222 (b) of the Act, 49 U. S. C. 322 (a) or 322 (b). Examples of such cases are *Southwestern Trading Co. v. United States*, 208 F. 2d 708 (involving cowhides); *Interstate Commerce Commission v. Yeary*, 104 F. Supp. 245, aff'd., 202 F. 2d 151 (redried tobacco); *Interstate Commerce Commission v. Weldon*, 90 F. Supp. 873, aff'd., 188 F. 2d 367, cert. den., 342 U. S. 827 (shelled raw peanuts); *Interstate Commerce Commission v. Kroebelin*, 113 F. Supp. 599, aff'd., 212 F. 2d 555, cert. den., 348 U. S. 836 (dressed poultry).

The avoidance of a multiplicity of suits obviously is to be desired and is of public importance.

The question presented is important to the public, particularly to motor carriers and shippers, for several additional reasons. Carriers such as Frozen Food Express desire to know, and need

to know, what the law requires of them as to obtaining authority to transport the commodities and products passed upon by the Commission in the *Determination* case, in order to comply with the requirements of the statute and thereby avoid the risks of prosecution and injunctive action. Moreover, those motor carriers who, in reliance upon the Commission's decision in the *Determination* case, have understood that operating authority was required for them lawfully to transport certain of the commodities now in question, and who have expended large sums of money in prosecuting applications for and obtaining such authority—those carriers desire to know and need to know whether their operating authorities are valuable or worthless. Others who would now seek operating authority, if authority is required in order to operate lawfully, are likewise entitled to know whether the Commission's findings and determinations are lawful or not. Shippers have a similar interest because they do not desire to risk possible prosecution for using the services of motor carriers operating unlawfully.

As was said by the Court in *Montana-Dakota Utilities Co. v. Federal Power Commission*, 169 F. 2d 392, 399, "The whole record here reflects the existence of a dispute and controversy, involving not only factual questions but also questions of law which ought to be determined for the future guidance of the petitioner and of the Commission."

The basis for the District Court's holding that the order in question is not subject to judicial review appears to be that the order "does not command the carrier to do, or to refrain from doing, anything," citing *United States v. Los Angeles & S. L. R. Co.*, 273 U. S. 299.

The court apparently overlooked the fact that the *Los Angeles* case was decided long before enactment of the Administrative Procedure Act, 5 U. S. C. 1001 et seq., and that "one of the main objectives [of that Act] was to extend the right of judicial review. * * * it broadened the scope of judicial review and it enlarged the class of persons who were given standing to invoke judicial process". *American President Lines v. Federal Maritime Board*, 112 F. Supp. 346, 349.

The reviewability of the Commission's order appears to be established by the decision of the Supreme Court in *Columbia Broadcasting System v. United States*, 316 U. S. 407. In that case the Federal Communications Commission, after investigation, issued a set of rules which it stated it would follow in exercising its licensing power, but which its report characterized as an announcement of policy (316 U. S. 422). CBS brought suit to enjoin the Commission's order, alleging that the Commission did not have authority to issue any such rules and that their enforcement would cause CBS irreparable injury (316 U. S. 408-409). The suit was brought under section

402 (a) of the Communications Act, 47 U. S. C. 402 (a), and the Urgent Deficiencies Act, the latter being the act under which the present suit was brought. The case was heard below by a district court of three judges, which dismissed the complaint for want of jurisdiction (316 U. S. 409). The questions considered by the Supreme Court were "whether the Commission's order is an 'order' review of which is authorized by section 402 (a) of the Act, 47 U. S. C. A., section 402 (a), and if so whether the bill states a cause of action in equity" (316 U. S. 415). The Court answered both questions in the affirmative.

In its discussion of the reviewability of the order the Court stated (316 U. S. 417):

* * * Such regulations which affect or determine rights generally, even though not directed to any particular person or corporation, when lawfully promulgated by the Interstate Commerce Commission, have the force of law and are orders reviewable under the Urgent Deficiencies Act. *Assigned Car Cases (United States v. Berwind-White Coal Min. Co.)*, 274 U. S. 564, 71 L. ed. 1204, 47 S. Ct. 727; *United States v. Baltimore & O. R. Co.*, 293 U. S. 454, 79 L. ed. 587, 55 S. Ct. 268. And regulations of like character, by which the Communications Commission has prescribed generally the records and accounts to be kept by telephone companies subject to its jurisdiction, are similarly reviewable under section 402

(a). *American Teleph. & Teleg. Co. v. United States*, 299 U. S. 232, 81 L. ed. 142, 57 S. Ct. 170.

And the Court also said (316 U. S. 419-420):

The purposes sought to be accomplished by section 402 (a) and the Urgent Deficiencies Act would be defeated if a suitor were unable to resort to them to avoid reasonably anticipated irreparable injury resulting from such legal consequences of the Commission's order, merely because the Commission as yet has neither refused to renew a license, as the regulations require, nor cancelled a license, as the regulations permit. Such an argument addressed to the form rather than the substance of the order was rejected in *Powell v. United States*, 300 U. S. 276, 81 L. ed. 643, 57 S. Ct. 470, *supra*; cf. *American Federation of Labor v. National Labor Relations Bd.*, *supra* (308 U. S. 408, 84 L. ed. 351, 60 S. Ct. 300). The *Powell Case* likewise repudiates the suggestion that merely because the order is not in terms addressed to those whose rights are affected, they cannot seek its review. See also *Western Pacific California R. Co. v. Southern P. Co.*, 284 U. S. 47, 76 L. ed. 160, 52 S. Ct. 56; *Claiborne-Annapolis Ferry Co. v. United States*, 285 U. S. 382, 76 L. ed. 808, 52 S. Ct. 440.

The Court ended its opinion with the following statement (316 U. S. 425):

* * * The ultimate test of reviewability is not to be found in an overrefined tech-

nique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control.

The *Columbia Broadcasting* case would appear to invalidate the reasoning of the District Court in the present case to the effect that the Commission's order is not reviewable because it "does not command the carrier to do, or refrain from doing, anything." For in the *Columbia* case this Court expressly held that the order there considered was reviewable even though "not in terms addressed to those whose rights are affected" and who seek its review, and "even though not directed to any particular person or corporation," provided the result of the order is to "affect or determine rights generally."

What has been said above should be sufficient to demonstrate that the Commission's order in the instant case, incorporating as it does the findings and conclusions as to a long list of commodities and products, does vitally affect and determine the operating rights of motor carriers generally.

Further support for the view that the Commission's order is reviewable is found in the recent (1954) decision in *Union Producing Co. v.*

Federal Power Commission, 127 F. Supp. 88.

There the plaintiff sued to set aside and enjoin enforcement of certain Power Commission orders, contending (as does Frozen Food Express in the instant case) that it was not subject to the Commission's jurisdiction, but that if it should ignore the orders and refuse to comply with them, and if it should later be decided that its position was erroneous and that the statute did apply to its operations, it would have incurred the risk of onerous penalties (a fine of a stated sum per day, similar to the penalties provided in 49 U. S. C. 322 (a) for violations by motor carriers). The Court held, contrary to the Power Commission's contention, that there was a justiciable controversy and that the questioned orders were subject to review. As will be noted, the facts in that case were in striking parallel with those in the instant suit.

The District Court seemed to base its decision also on the fact that the Commission's order "discontinued" the *Determination* proceeding. That fact does not make the order nonreviewable. On the contrary, it is a circumstance which supports the conclusion that the order is reviewable, for the fact that the proceeding was discontinued shows that the Commission had completed its task, i. e., that the order thereby became a final order. This view is supported by *El Dorado Oil Works v. United States*, 328 U. S. 12, 18-19, where this Court said:

Before we reach the merits of the controversy we must at the outset briefly dispose of the jurisdictional question. As the facts already stated reveal, the Commission's findings and determination if upheld constitute far more than an "abstract declaration." "Legal consequences" would follow which would finally fix a "right of obligation" on appellants' part. These findings are more than a mere "stage in an incomplete process of administrative adjudication," for the Commission here has discontinued further proceedings. We, therefore, think that the Commission's action falls within the class of "orders" which *Rochester Teleph. Corp. v. United States*, 307 U.° S. 125, 83 L. ed. 1147, 59 S. Ct. 754, held to be reviewable by a district court of three judges. The district court erred in dismissing the complaint for want of jurisdiction.

CONCLUSION

It is submitted, therefore, that the question presented by this appeal is substantial and of general public importance; and that the decision of the District Court is so clearly erroneous as to warrant its summary reversal.

Respectfully submitted.

LEO H. POT,
Associate General Counsel,
Interstate Commerce Commission.

APPENDIX A

In the District Court of the United States for
the Southern District of Texas, Houston
Division

Civil Action No. 8285 and Civil Action No. 8396

FROZEN FOOD EXPRESS, PLAINTIFF, EZRA TAFT BEN-
SON, SECRETARY OF AGRICULTURE OF THE UNITED
STATES, INTERVENING PLAINTIFF

v.

UNITED STATES OF AMERICA AND INTERSTATE
COMMISSION, DEFENDANTS, COMMON CARRIER
IRREGULAR ROUTE CONFERENCE OF AMERICAN
TRUCKING ASSOCIATION, ET AL., INTERVENING
DEFENDANTS

January 26, 1955

Before HUTCHESON, *Chief Circuit Judge*, and
CONNALLY and KENNERLY, *District Judges*
CONNALLY, *District Judge*:

Filed pursuant to Secs. 1336, 1398, and 2321-
2325, of Title 28; to Sec. 1009, of Title 5; and to
Sec. 305 (g), of Title 49, U. S. C. A., each of the
foregoing civil actions attacks and seeks to re-
strain enforcement of an order of the Interstate
Commerce Commission. Presenting the same
question of law, and substantial identity of par-
ties, the actions were consolidated for hearing
and trial. The question for determination is
whether a number of different commodities, as

later noted herein, all of which have their origin on the farm or ranch, fall within the scope of the so-called agricultural exemption (Sec. 303 (b) (6)) of Part II of the Interstate Commerce Act (Title 49, U. S. C. A., Sec. 301, et seq.). By terms of the last-mentioned statute, motor vehicles used in carrying property consisting of "ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)," are exempt from Interstate Commerce Commission control (save for minor exceptions not here pertinent). The plaintiff in each of the consolidated actions, being a trucking concern holding a certificate of convenience and necessity from the Commission, desires to carry some or all of the commodities in question, unrestricted by the terms of its own certificate, or by other Commission regulation. Hence the plaintiff, supported to a considerable extent in this contention by the Secretary of Agriculture of the United States, urges upon the Court a broad interpretation of the statutory language "agricultural commodities (not including manufactured products thereof)," which would have the net result of enlarging this so-called agricultural exemption. The Commission, on the other hand, and those intervenors who align themselves with the Commission, urge upon us that most of the commodities in question, by virtue of the treatment and processing which they receive, either have lost their identity as "agricultural commodities," or have become "manufactured products thereof." The result of this argument is drastically to restrict the scope of the exemption.

Civil Action 8285

In June 1948, the Interstate Commerce Commission, of its own motion, instituted a proceeding, being MC-C-968 on its docket, in the nature of an investigation, to determine the meaning and scope of the term "agricultural commodities (not including manufactured products thereof)", as used in the above-mentioned statute. The proceeding was widely noticed in the affected trades and industries. Many interested parties, including the Secretary of Agriculture of the United States, the Commissioners of Agriculture from a number of the States, associations of shippers, motor carriers, and others, intervened. After extended hearings, during which much expert testimony was offered as to the manner and method of cleaning, preparing, packaging, and otherwise processing the various commodities in question, the Commission issued its report and order entitled "Determination of Exempted Agricultural Commodities" (52 I. C. C. Reports, Motor Carrier Cases, 511-566). In such report, the Commission announced its definition of such statutory term,¹

¹"In No. MC-C-968, we find that the term 'agricultural commodities' (not including manufactured products thereof)' as used in section 203 (b) (6) of the Interstate Commerce Act means: Products raised or produced on farms by tillage and cultivation of the soil (such as vegetables, fruits, and nuts); forest products; live poultry and bees; and commodities produced by ordinary livestock, live poultry, and bees (such as milk, wool, eggs, and honey), but not including any such products or commodities which, as a result of some treatment, have been so changed as to possess new forms, qualities, or properties, or result in combinations."

which definition it then undertook to apply to the various commodities under consideration, and enumerated those which it found to come within the statutory language, and those which it found to fall without.² Thereupon, the proceeding was terminated and removed from the Commission docket.

² "We find that the term 'agricultural commodities' (not including manufactured products thereof) as used in section 203 (b) (6) includes: (1) fruits, berries, and vegetables which remain in their natural state, including those packaged in bags or other containers, but excluding those placed in hermetically sealed containers, those frozen or quick frozen, and those shelled, sliced, shredded, or chopped up; (2) fruits, berries, and vegetables dried naturally or artificially; (3) seeds, including inoculated seeds, but not seeds prepared for condiment use or those which have been deawned, scarified or otherwise treated for seedling purposes; (4) forage, hay, straw, corn and sorghum fodder, corn cobs, and stover; (5) (a) hops and castor beans, and (b) leaf tobacco, but excluding redried tobacco leaf; (6) raw peanuts, and other nuts, unshelled; (7) whole grains, namely, wheat, rye, corn, rice, oats, barley and sorghum grain, not including dehulled rice and oats, or pearled barley; (8) (a) cotton in bales or in the seed, (b) cottonseed and flaxseed, and (c) ramie fiber, flax fiber, and hemp fiber; (9) live poultry, namely, chickens, turkeys, ducks, geese, and guineas; (10) milk, cream, and skim milk, including that which has been pasteurized, standardized milk, homogenized milk and cream, vitamin 'D' milk, and vitamin 'D' skim milk; (11) wool and mohair, excluding cleaned and scoured wool and mohair; (12) eggs, including oiled eggs, but excluding whole or shelled eggs, frozen or dried eggs, frozen or dried egg yolks, and frozen or dried egg albumin; (13) (a) trees which have been felled and those trimmed, cut to length, peeled or split, but not further processed, and (b) crude resin, maple sap, bark, leaves, Spanish moss, and greenery; (14) sugar cane, sugar beets, honey in the comb, and strained honey."

The plaintiff Frozen Food Express was not a party to the proceeding before the Commission. By amended complaint filed here July 12, 1954, plaintiff alleges that it desires to carry agricultural commodities (not including manufactured products thereof) for hire, to and from all points within the United States, irrespective of the limitations imposed by its own certificate; that the report of April 13, 1951, deprives plaintiff of its right to do so. Alleging that the action of the Commission, in entering the report in question, was arbitrary, capricious and unreasonable, that it constituted an abuse of discretion and a violation of the Commission's statutory powers, the plaintiff here seeks an injunction to restrain the Commission and the United States from enforcing or recognizing the validity of such report; restraining interference with the plaintiff's proposed transportation of such agricultural commodities (not including manufactured products thereof), and seeks an order of this Court declaring the report of the Commission of April 13, 1951, to be null and void.

The Secretary of Agriculture has intervened, denominating himself "Intervening Plaintiff." He makes common cause with plaintiff in contending that a number of commodities are within the exemption. Several trucking associations,

^a"(1) Slaughtered meat animals and fresh meats; (2) dressed and cut-up poultry, fresh or frozen; (3) feathers; (4) raw shelled peanuts and raw shelled nuts; (5) hay chopped up fine; (6) cotton linters and cottonseed hulls; (7) frozen cream, frozen skim milk, and frozen milk; (8) seeds which have been deawned, scarified, or inoculated."

and some sixty southern and western railroad companies, have intervened. These interveners take a contrary view, and support the report of the Interstate Commerce Commission.

We are of the opinion that the action may not be maintained, and must be dismissed, for the reason that the report and order of the Interstate Commerce Commission of April 13, 1951, is not an "order" subject to judicial review under any of the statutes cited. The proceeding before the Commission was not an adversary one. The order which initiated it purported to do no more than direct that an investigation be made of the meaning of the statutory language. Notice was given only to the public. When the final report and order was forthcoming some two years later, the only "order" entered was one discontinuing the proceeding and removing it from the Commission's docket. The question is controlled by *U. S. v. Los Angeles R. R. Co.* (273 U. S. 284), holding a very similar "order" of the Interstate Commerce Commission which found, after an investigation, the value of certain railroad properties, not to be subject to review. The language of Mr. Justice Brandeis, speaking for a unanimous Court there, aptly describes the order in issue here:

The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not

change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation.

The proponents of jurisdiction here rely upon *Columbia Broadcasting System v. U. S.* (316 U. S. 407). It was there held that an order of the Federal Communications Commission promulgating certain rules and regulations requiring that the Commission deny a license to broadcasting stations under certain circumstances, was subject to judicial review, upon a showing by the complaining party of strong equitable considerations. This authority is clearly distinguishable from the present case. The order there in question was entered in the exercise of the agency's rule-making power. Such orders, together with those fixing rates and those determining controversies before the administrative body, have long been recognized as subject to review (*U. S. v. Los Angeles R. R. Co.*, *supra*).

Likewise, the complaining party there showed an immediate and continuing threat of irreparable injury if the order were not reviewed. It is not so here. The statement of plaintiff that it desires to carry for hire most or all of the commodities on the Commission's proscribed list, and that if it does so, the Commission likely will seek injunctive relief to restrain plaintiff, shows no basis for the intervention of a court of equity. Plaintiff will

have an adequate remedy in the event of such interference.

It follows that Civil Action 8285 will be dismissed.

Civil Action 8396

A complaint was filed December 23, 1953, with the Interstate Commerce Commission by East Texas Motor Freight Lines, Gillette Motor Transport, Inc., and Jones Truck Lines, Inc., charging that Frozen Food Express was and has been engaged in transporting fresh and frozen dressed poultry, and ~~fresh~~ and frozen meats, and meat products, for hire, between points in interstate commerce not authorized by its certificate of convenience and necessity. Frozen Food readily admitted that it had been so engaged, but defended on the theory that such products all were within the agricultural exemption. The Commission found each of these products not to be within the exemption, and ordered Frozen Food Express to cease and desist from such unauthorized transportation. The present proceeding was filed by Frozen Food Express to review that order.

While the present action was pending in this Court, the Secretary of Agriculture of the United States filed with the Commission his petition for leave to intervene, pursuant to Sec. 1291, of Title 7, U. S. C. A. This request was denied; and the Secretary appears here as "Intervening Plain-

* Plaintiff has abandoned the contention that meat products are within the agricultural exemption, and this commodity will not be further considered here.

tiff contending (1) that the proceedings before the Commission were null and void by reason of the failure of the Commission to notify him of the pendency thereof (Sec. 1291 (a), of Title 7, U. S. C. A.); (2) that the proceedings should be remanded to the Commission by reason of its error of law in having denied him leave to intervene; and (3) that the cease and desist order should be enjoined by reason of the alleged error of the Commission in holding fresh and frozen meats, and fresh and frozen dressed poultry, to be beyond the limits of the agricultural exemption.

The rail carriers and trucking associations which intervened in Civil Action 8285, also appear in this action. They support the Commission, and oppose the position taken by the plaintiff and the Secretary of Agriculture.

Armour & Company, being engaged at various points in the United States in the slaughter of livestock and the killing, dressing, and sale of poultry, has intervened, urging that dressed poultry is an exempt commodity, that meat is not.

The position taken by the Secretary of Agriculture that the proceeding before the Commission was null and void in its entirety by reason of the failure of the Commission to give him notice thereof, need not long detain us. The proceeding there was not one with respect to "rates, charges, tariffs, and practices" relating to the transportation of farm products, and hence was not one of which the Secretary was entitled to notice under the statute (Secs. 1291 and 1622, of Title 7, U. S. C. A.). *U. S. v. Pa. R. R. Co.* (242 U. S. 208); *B & O R. R. Co. v. U. S.* (277 U. S. 292); *Mo.*

Pac. R. R. Co. v. Norwood (283 U. S. 249). The Commission likewise did not commit an error of law in denying the Secretary's Petition of Intervention, filed there while the present proceeding was pending here.

Most able and exhaustive treatment is given the question now before us, in so far as it concerns dressed poultry, by Judge Graven of the United States District Court for the Northern District of Iowa, in *I. C. C. v. Kroblin* (113 F. Supp. 599, aff., 212 F. 2d 555; cert. den., Oct. 14, 1954). Reviewing the long struggle between the Interstate Commerce Commission in its efforts to restrict the application of the exemption in question, and the Department of Agriculture and others in seeking to expand it; reviewing the legislative history of the Motor Carrier Act of 1935, and various proposed amendments thereto; and considering the congressional intent which prompted the insertion of the agricultural exemption, Judge Graven concluded that dressed poultry constituted an "agricultural commodity," and did not constitute a "manufactured product thereof." Hence, such commodity was within the exemption. It is sufficient to state that we agree with those conclusions as to fresh and frozen dressed poultry.

Counsel for the Commission urges that this Court should disregard the *Kroblin* case, on the argument that the only question before us is one of the adequacy of the evidence before the Commission. It is said that the order which was entered was one within the general purview of the Commission's authority, and that if its findings

are supported by "substantial evidence", this Court has no alternative but to leave it undisturbed. While we do not quarrel with such statement as a general proposition of law, the argument is not convincing in its application to the present record. The primary facts before the Commission were without dispute and were the subject of stipulation. Reduced to simplest form, they showed that before a chicken or duck became "dressed poultry", the bird was killed, his feathers and entrails removed, he was chilled, and in some cases frozen, packaged, etc. In addition, such "facts" consisted of evidence of so-called "expert" nature, that this treatment or processing of the chicken or duck rendered him a "manufactured product".

It is apparent that there is only one ultimate finding called for, namely, whether under the type of processing reflected by the record, the product falls within the statutory definition. The question then is a mixed one of law and fact, calling for the application of the processes of legal reasoning and of principles of statutory construction. The fact that the Commission's findings are supported by an "expert" who gives his opinion that a dressed chicken is a manufactured product, does not foreclose the question, nor remove it from the scope of judicial review. *Baumgartner v. U. S.* (322 U. S. 665); *Lehmann v. Acheson* (206 F. 2d 592, 3C); *Galena Oaks Corp. v. Scofield* (— F. 2d —, 5C, Dec. 29, 1954, as yet unreported).

In our opinion, fresh and frozen meat does not fall within the category either of "ordinary livestock" or of "agricultural commodities"; and

hence is not within the exemption. Since the enactment of Part II of the Interstate Commerce Act in 1935, motor vehicles used exclusively in carrying "livestock, fish (including shell fish), or agricultural commodities (not including manufactured products thereof)", have been exempt. By amendment in 1940, the term "ordinary" was inserted immediately before the word "livestock". The term "ordinary livestock" is defined in Sec. 20 (11) of the Act as "all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses".

Referring only to the live animals, "ordinary livestock" may not be tortured to include the carcasses of slaughtered meat animals, or the meat which is the product of butchering. Meat has been regarded generally in the industry as a controlled commodity for some twenty years. Congress has dealt with the agricultural exemption on many occasions. Considering the ease with which the Congress might have added appropriate language to evidence its intent to exempt fresh or frozen meat from Interstate Commerce Commission control, if it so desired, the absence of such language indicates that no such intent was entertained.

Nor may meat, fresh or frozen, be considered an "agricultural commodity" for present purposes. The exemption has treated the live meat animal in a separate generic class from "agricultural commodity" since the enactment of the statute; and if the live animal, on entering the slaughter pen or the packing house, is not an

"agricultural commodity," we are unable to see how he becomes one on emerging therefrom in the form of beef or pork. The Commission was correct, in our opinion, in holding fresh and frozen meat to be non-exempt.

The enforcement of the order of the Interstate Commerce Commission, MC-C-1605, *East Texas Motor Freight Lines, Inc., et al. v. Frozen Food Express*, is enjoined and restrained in so far as said order interfered with, enjoins or restrains the plaintiff Frozen Food Express from transporting fresh and frozen dressed poultry in interstate commerce (when the motor vehicles used in carrying such poultry are not used for carrying any other property or passengers for compensation). Other relief sought by plaintiff is denied.

Clerk will notify counsel.

Done at Houston, Texas, this 26th day of January 1955.

(S) JOSEPH C. HUTCHESON, Jr.,
Chief Judge, Fifth Circuit,

(S) BEN C. CONNALLY,
United States District Judge,

(S) T. M. KENNERLY,
United States District Judge,

Concurring in Part and Dissenting in Part.

KENNERLY, *District Judge*: Concurring in part and dissenting in part.

I concur with all the foregoing opinion except the decision in Civil Action 8396 with respect to fresh meat and frozen meat. As to that I respectfully dissent.

I think all of Section 303 (b) should be given a broad and liberal construction, and that Section

303 (b) (6) should be construed as including fresh meat and frozen meat. I think we should not only follow the reasoning of both the District Court and Court of Appeals in the *Kroblin* case with respect to dressed poultry and frozen dressed poultry, but that what is said is also applicable to fresh meats and frozen meats.

(S) T. M. KENNERLY,

Judge.

APPENDIX B

**In the United States District Court, Southern
District of Texas, Houston Division**

Civil Action No. 8285

FROZEN FOOD EXPRESS, ET AL., PLAINTIFFS,

v.

**UNITED STATES OF AMERICA, INTERSTATE COM-
MERCE COMMISSION, ET AL., DEFENDANTS**

JUDGMENT

This action, to enjoin and set aside an order of the Interstate Commerce Commission, having come on for final hearing on November 16, 1954, before a duly constituted three-judge District Court, convened pursuant to Sections 2284 and 2321-2325, Title 28, United States Code, consisting of the undersigned judges; and the Court having considered the pleadings and evidence, and the briefs and arguments of counsel for the respective parties, and being fully advised in the premises; and having on January 26, 1955, filed herein its opinion, holding that the order sought by the plaintiffs to be set aside and enjoined is not an order subject to judicial review under any of the said statutes; now, in accordance with the said opinion, it is hereby

Ordered, adjudged, and decreed that the relief prayed for by the plaintiffs, including the Secre-

tary of Agriculture as an intervening plaintiff, be, and the same hereby is, denied, and their complaints be, and the same hereby are, dismissed.

This the 23d day of February 1955.

(S) JOSEPH C. HUTCHESON, Jr.,
*Chief Judge, United States Court
of Appeals for the Fifth Circuit.*

(S) THOMAS M. KENNERLY,
United States District Judge.

(S) BEN C. CONNALLY,
United States District Judge.

APPENDIX C

ORDER

AT A GENERAL SESSION OF THE INTERSTATE COMMERCE
COMMISSION, HELD AT ITS OFFICE IN WASHINGTON,
D. C., ON THE 13TH DAY OF APRIL, A. D. 1951

No. MC-C-968

DETERMINATION OF EXEMPTED AGRICULTURAL COMMODITIES

No. MC-107669

NORMAN E. HARWOOD CONTRACT CARRIER APPLICATION

It appearing, That by order entered in No. MC-C-968, the Commission, on its own motion, instituted an investigation into and concerning the meaning of the words "agricultural commodities (not including manufactured products thereof)" as used in section 203 (b) (6) of the Interstate Commerce Act;

It further appearing, That on December 16, 1947, the Commission, division 5, entered its report, 47 M. C. C. 597, and order in No. MC-107669 granting applicant, Norman E. Harwood, a permit authorizing certain operations, in interstate or foreign commerce, as a contract carrier by motor vehicle, and otherwise denying the application;

It further appearing, That upon consideration of petitions filed by the Secretary of Agriculture and the Atlantic Commission Co., Inc., and others, the Commission reopened the proceeding in No. MC-107669 for further hearing on a consolidated record with No. MC-C-968;

And it further appearing, That full investigation of the matters and things involved has been made, and that the Commission, on the date hereof, has made and filed its report on oral argument herein containing its findings of fact and conclusions thereon, which report and the report and order of December 16, 1947, in No. MC-107669, are hereby referred to and made a part hereof:

It is ordered, That the proceeding in No. MC-C-968 be, and it is hereby discontinued.

It is further ordered, That the order of December 16, 1947, in No. MC-107669, be, and it is hereby, vacated and set aside.

And it is further ordered, That the application in No. MC-107669, be, and it is hereby, denied.

By the Commission.

[SEAL]

W. P. BARTEL,
Secretary.

No. 160

Office - Supreme Court, U. S.
FILED
JUN 17 1955
HAROLD B. WILLEY, Clerk

IN THE
Supreme Court of the United States

October Term, 1955

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., Appellants

v.

FROZEN FOOD EXPRESS, ET AL., Appellees

Appeal from the United States District Court for the
Southern District of Texas, Houston Division

STATEMENT AS TO JURISDICTION

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No.

IN THE

Supreme Court of the United States

October Term, 1955

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., *Appellants*

V.

FROZEN FOOD EXPRESS, ET AL., *Appellees*

Appeal from the United States District Court for the
Southern District of Texas, Houston Division

STATEMENT AS TO JURISDICTION

In compliance with Rule 15 of the Revised Rules of the Supreme Court of the United States, American Trucking Associations, Inc., and the Common Carrier Conference Irregular Route and the Contract Carrier Conference thereof submit herewith their statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the district court entered in the cause.

OPINION BELOW

The opinion of the United States District Court for the Southern District of Texas, Houston Division, is reported at 128 F. Supp. 374 and a copy is appended hereto (Appendix A). A copy of the final judgment of the district court also is appended (Appendix B). The re-

port of the Interstate Commerce Commission in Docket No. MC-C-968, *Determination of Exempted Agricultural Commodities*, is reported at 52 M.C.C. 511.

JURISDICTION

1. *Nature of proceeding below*

The action in the district court was brought to suspend, enjoin, annul and set aside the report of the Interstate Commerce Commission in Docket No. MC-C-968, *Determination of Exempted Agricultural Commodities*, pursuant to Section 205(g) of the Interstate Commerce Act, 49 U.S.C. §305(g), Section 10 of the Administrative Procedure Act, 5 U.S.C. §1009, and Sections 1336, 1398, 2284 and 2321 to 2325, inclusive of the Judicial Code, 28 U.S.C. §§1336, 2284, 1398 and 2321-2325.

2. *Dates of proceeding below*

Judgment of the United States District Court for the Southern District of Texas, Houston Division, was rendered February 23, 1955, and notice of appeal was filed in said Court on April 20, 1955.

3. *Statutory provisions conferring jurisdiction*

The jurisdiction of the Supreme Court of the United States to review the decision of the district court on direct appeal is conferred by Sections 1253 and 2101(b) of the Judicial Code, 28 U.S.C. §§1253 and 2101(b).

4. *Cases sustaining jurisdiction*

The jurisdiction of the Supreme Court of the United States to review the decision of the district court on direct appeal is sustained by *El Dorado Oil Works v. United States*, 328 U.S. 12, 66 S.Ct. 843. See also *King v. United States*, 344 U.S. 254, 260, 73 S.Ct. 259, 263;

Swift & Co. v. United States, 343 U.S. 373, 376, 72 S.Ct. 716, 718; *Radio Corp. of America v. United States*, 341 U.S. 412, 414, 71 S.Ct. 806, 807, and other cases.

QUESTION PRESENTED

Did the United States District Court for the Southern District of Texas err in its judgment rendered February 23, 1955 (Appendix B), dismissing the complaints filed in Civil Action No. 8285, *Frozen Food Express, et al. v. United States, et al.*, for the reason set forth in the Court's opinion filed January 26, 1955 (Appendix A), that the order of the Interstate Commerce Commission, dated April 13, 1951, in Docket No. MC-C-968, *Determination of Exempted Agricultural Commodities*, 52 M.C.C. 511, sought by the plaintiffs to be set aside and enjoined, is not an order subject to judicial review under Section 205(g) of the Interstate Commerce Act, 49 U.S.C. §305(g), Section 10 of the Administrative Procedure Act, 5 U.S.C. §1009, and Sections 1336, 1398, 2284 and 2321 to 2325, inclusive, of the Judicial Code, 28 U.S.C. §§1336, 1398, 2284, and 2321-2325, although the Commission in said proceeding classified certain processed agricultural commodities as being embraced within the exemption of Section 203(b)(6) of the Interstate Commerce Act, 49 U.S.C. §303(b)(6), and hence transportable by motor vehicles not subject to economic regulation by the Commission and classified other such processed agricultural commodities as being beyond the scope of the exemption of Section 203(b)(6) and thus able to be carried only in Commission-regulated motor vehicles?

STATEMENT

Section 203(b) of the Interstate Commerce Act, 49 U.S.C. §303(b), provides, in part, as follows:

Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include . . . (b) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation; . . . [Emphasis added.]

The task of administering and enforcing the provision of the Act is that of the Interstate Commerce Commission. Section 204(a)(6), 49 U.S.C. §304(a)(6), *McLean Trucking Co. v. U. S.*, 321 U.S. 67, 79, 64 S.Ct. 370, 377. For years the Commission determined item by item, as the question arose, what products were agricultural commodities within the terms of the exemption of Section 203(b)(6), *Settle Common Carrier Application*, 46 M.C.C. 277 (eggs), *Severson Common Carrier Application*, 46 M.C.C. 6 (whole, skim and standardized milk and cream), *Newman Contract Carrier Application*, 44 M.C.C. 190 (apples), *Derr Contract Carrier Application*, 43 M.C.C. 437 (raw milk), *Dougherty Common Carrier Application*, 31 M.C.C. 793 (mushrooms), *Post Contract Carrier Application*, 13 M.C.C. 139 (potatoes), *Hubbs Common Carrier Application*, 6 M.C.C. 708 (peas), *Dimmick Common Carrier Application*, 6 M.C.C. 697 (peas), *Ramsey Contract Carrier Application*, 6 M.C.C. 647 (cream), *Phelps Common Carrier Application*, 6 M.C.C. 629 (peas), *Akes Common Carrier Application*, 6 M.C.C. 543 (peas), *Harris & Callis Contract Carrier Application*, 4 M.C.C. 169 (peanuts), *Bowen Common Carrier Application*, 3 M.C.C. 655 (fresh fruits and vegetables), *Zambrski Common Carrier Application*, 3 M.C.C. 610 (fresh fruits and vegetables), *Le Compte Common Carrier Application*, 3 M.C.C. 241 (fresh corn, tomatoes and beans), *Williams Contract Car-*

rier Application, 2 M.C.C. 685 (fresh fruits and vegetables), Clemence Contract Carrier Application, 2 M.C.C. 292 (fresh melons and sweet potatoes), Stone Contract Carrier Application, 2 M.C.C. 259 (fresh fruits and vegetables), Cavallaro Common Carrier Application, 2 M.C.C. 65 (fresh fruits and vegetables), Janesofsky Common Carrier Application, 1 M.C.C. 799 (grain), Pohl Contract Carrier Application, 1 M.C.C. 707 (milk and cream), and what products were manufactured agricultural commodities, Harwood Contract Carrier Application, 47 M.C.C. 597 (vegetable salads and washed spinach in cellophane bags), Monark Egg Corporation Contract Carrier Application, 44 M.C.C. 15 (shelled nuts and dressed poultry), Newton Extension of Operations—Frozen Foods, 43 M.C.C. 787 (frozen fruits and vegetables), McCann Common Carrier Application, 42 M.C.C. 61 (frozen fruits and vegetables), McCarty Common Carrier Application, 32 M.C.C. 615 (dressed poultry), W. H. Tompkins Common Carrier Application, 29 M.C.C. 359 (packing house products), Allen Common Carrier Application, 28 M.C.C. 26 (dressed poultry), Lard and Vegetable Oil etc., 26 M.C.C. 135 (lard), Hausman Extension—Morton, Ill., 20 M.C.C. 641 (meat and lard), Battaglia Common Carrier Application, 18 M.C.C. 167 (dressed poultry, butter and cheese), Luckey Common Carrier Application, 12 M.C.C. 739 (pasteurized milk), Dugan Contract Carrier Application, 7 M.C.C. 15 (clean rice, rice bean and rice polish), Harris & Callis, *supra* (ground peanut shells), Pohl, *supra*, (cream cheese and cottage cheese), Juett Contract Carrier Application, 1 M.C.C. 268 (oleomargarine).

The need for a comprehensive investigation of the meaning and scope of the partial exemption of Section 203(b)(6) having become apparent and the Secretary of Agriculture of the United States having petitioned for a general investigation, the Commission, by notice dated

June 21, 1948, initiated on its own motion a proceeding, docketed as No. MC-C-968, *Determination of Exempted Agricultural Commodities*, to define the words "agricultural commodities (not including manufactured products thereof)" as they appeared in that section. After extensive hearings, covering 1,509 pages of testimony, the filing of exceptions to the examiner's proposed report and replies thereto and oral argument before the entire Commission, the Commission on April 13, 1951, issued its order discontinuing the proceeding.

The order expressly referred to and incorporated the concurrent report of the Commission containing its findings of fact and conclusions thereon. The Commission found, *inter alia*, that

... the term "agricultural commodities (not including manufactured products thereof)" as used in section 203(b)(6) of the Interstate Commerce Act means: Products raised or produced on farms by tillage and cultivation of the soil (such as vegetables, fruits, and nuts); forest products; live poultry and bees; and commodities produced by ordinary livestock, live poultry, and bees (such as milk, wool, eggs, and honey), but not including any such products or commodities which, as a result of some treatment, have been so changed as to possess new forms, qualities, or properties or result in combinations. [52 M.C.C. 557.]

The Commission listed 14 commodities or groups of commodities in varying states of production which it deemed to be "agricultural commodities (not including manufactured products thereof)" as used in Section 203 (b)(6). The list did not include, among other products, fresh or frozen meat, fresh or frozen dressed poultry, feathers, shelled nuts and cotton seed hulls, the Commission, unlike the examiner, having concluded with respect to these commodities that for one reason or another they

were not embraced within the partial exemption of Section 203(b)(6).

In the subject proceeding before the district court a motor common carrier sought to have the Commission's report and order in the *Determination* case enjoined, annulled and set aside insofar as it declared fresh or frozen meat, fresh or frozen dressed poultry, feathers, shelled nuts, and cotton seed hulls, among other products, not to be embraced within the partial exemption of Section 203(b)(6). By its order of February 23, 1955, set out in Appendix B hereof, the district court dismissed the complaint. The reason for dismissing the complaint as stated in the court's opinion, dated January 26, 1955, and quoted in its entirety in Appendix A hereof, was that "the report and order of the Interstate Commerce Commission of April 13, 1951, is not an 'order' subject to judicial review under any of the statutes cited."

SUBSTANTIALITY OF QUESTION

The question presented by this appeal is important to the maintenance of a stable national transportation system by motor vehicles, efficient and adequate to meet the needs of commerce, the postal service and the national defense. National Transportation Policy, 49 U.S.C. preceding §1.

The decision of the district court has rendered the Commission's report and order in the *Determination* case impotent. Stripped of the vitality that court review of the decision would have imparted, the report and order stands barren, without purpose or meaning.

If sustained the district court's decision would require the status of each agricultural commodity as falling within or beyond the scope of the partial exemption of Section 203(b)(6) to be litigated before the courts, including

the Supreme Court of the United States. Uncertainty would pervade this important segment of the transportation industry so long as law suits could be brought.

However, as the decision of the district court clearly is contrary to the law as well-established by the decisions of the Supreme Court of the United States, it should be reversed. As reasons therefor appellant says:

1. *The decision of the district court is contrary to the law.*

The mere reading of the reasoning of the district court leading to the dismissal of the complaint discloses the error of law that was committed by the court. In support of its conclusion that the report and order of the Commission in the *Determination* case was not an "order" subject to judicial review the court said:

The proceeding before the Commission was not an adversary one. The order which initiated it purported to do no more than direct that an investigation be made of the meaning of the statutory language. Notice was given only to the public. When the final report and order was forthcoming some two years later, the only "order" entered was one discontinuing the proceeding and removing it from the Commission's docket. The question is controlled by *U. S. v. Los Angeles R.R. Co.* (273 U.S. 284), holding a very similar "order" of the Interstate Commerce Commission which found, after an investigation, the value of certain railroad properties, not to be subject to review. The language of Mr. Justice Brandeis, speaking for a unanimous Court there, aptly describes the order in issue here:

"The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the car-

rier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the cause of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation."

The situation presented by this appeal clearly is distinguishable from that of the *Los Angeles* case. The Commission's report and order in the *Determination* case has been binding upon the motor-carrier industry. Following the decision many motor carriers undertook to transport commodities formerly considered as subject to regulation under the Interstate Commerce Act. *Increases, Pacific Northwest*, 54 M.C.C. 125, 127. Conversely, many motor carriers that previously had engaged in the transportation of products found to be manufactured agricultural commodities in the *Determination* case either ceased transporting such products or filed applications with the Commission for certificates or permits authorizing such transportation. See *Cosgrove and Demers Extension—Central States*, 53 M.C.C. 365.

Motor carriers who have continued to transport, without authority, products that the Commission found in its report and order in the *Determination* case to be manufactured agricultural commodities have violated Section 206 and Section 209 of the Act, respectively. 49 U.S.C. §§306 and 309. They have been ordered by the Commission, pursuant to Section 204(c) of the Act, 49 U.S.C. §304(c), to cease and desist from continuing such unlawful transportation. *Dart Transit Co.—Investigation of Operations*, 54 M.C.C. 429, sustained, *Dart Transit Co. v. Interstate Commerce Commission*, 110 F.Supp. 876, affirmed, *per curiam*, 345 U.S. 980, 73 S.Ct. 1138, *East Texas Motor Freight Lines, Inc. v. Frozen Food Express*,

62 M.C.C. 648, sustained in part, *Frozen Food Express v. United States*, 128 F. Supp. 374. They have been sued by the Commission for injunctions to restrain their further violations of the Act, Section 222(b), 49 U.S.C. §322(b), *I.C.C. v. Allen E. Kroblin, Inc.*, 113 F.Supp. 599, affirmed 212 F.(2d) 555, *I.C.C. v. Wagner*, 112 F. Supp. 109, *I.C.C. v. Yeary Transfer Co.*, 104 F. Supp. 245, affirmed 202 F.(2d) 151, and they have been criminally prosecuted and convicted under Section 222(a) of the Act, 49 U.S.C. §222(a). *Southwestern Trading Co. v. U. S.*, 208 F. (2d) 708.

Furthermore, in passing upon applications for motor common carrier authority filed pursuant to Section 207 of the Act, 49 U.S.C. §307, or applications for motor contract carrier authority filed pursuant to Section 209, 49 U.S.C. §309, the Commission has given effect to its report and order in the *Determination* case. *Direct Transit Lines, Inc., Extension*, 62 M.C.C. 231, *Valleskey Common Carrier Application*, 62 M.C.C. 228.

The report and order in the *Determination* case was more than a mere "press release." The findings embodied therein "must be taken by those entitled to rely upon them as to what they purport to be—an exercise of the delegated legislative power—which, until amended, are controlling alike upon the Commission and all others whose rights may be affected by the Commission's execution of them." *Columbia Broadcasting System v. United States*, 316 U.S. 407, 422, 62 S.Ct. 1194, 1202. That they were embodied in an investigatory proceeding rather than a rule-making one is immaterial. "The particular label placed upon it by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive" *Columbia Broadcasting System v. United States, supra*, at 316 U.S. 416, 62 S.Ct. 1200.

Nor is the effect of the Commission's order diminished by the fact that it was addressed to no specified carrier. It would be unrealistic to contend that because the Commission ordered no particular motor carrier to change its course of conduct, relief against what the Commission actually did is unavailable. This Court long has granted relief to parties claiming injury from an alleged unlawful public action, although such action made no direct demands upon them. *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123, 141, 71 S.Ct. 624, 633.

Directly in point are two decisions of the Supreme Court of the United States and a decision of the United States District Court for the District of New Jersey in which judicial review under the cited statutes or preceding legislation was had of orders of the Interstate Commerce Commission that suffered all or some of the technical deficiencies that the district court found in the subject proceeding to be fatal.

The Commission's report and order in *Allowances for Privately Owned Tank Cars*, 258 I.C.C. 371, was not rendered in an adversary proceeding. The order which initiated the proceeding purported to do no more than direct that an investigation be made into the lawfulness of certain practices. When the final report and order was forthcoming some four years later, the only "order" was one discontinuing the proceeding and removing it from the Commission's docket.

Nevertheless the Supreme Court of the United States in *El Dorado Oil Works v. U. S.*, *supra*, reversed the judgment of the district court dismissing the action for want of jurisdiction on the ground that the Commission's action did not amount to a reviewable "order." This Court said, at 328 U.S. 18, 66 S.Ct. 846:

... the Commission's findings and determination if upheld constitute far more than an "abstract declaration." "Legal consequences" would follow which would finally fix a "right or obligation" on appellants' part. These findings are more than a mere "stage in an incomplete process of administrative adjudication", for the Commission has discontinued further proceedings.

Similarly in *Powell v. United States*, 300 U.S. 276, 284, 57 S.Ct. 470, 475, the contention was made that the antecedent Commission order in *Pollard, Receiver, v. Fort Benning R. Co.*, 206 I.C.C. 362, striking a certain tariff from the Commission's files, was not reviewable under the statute because it was not directed to any party; it required no one to do or to refrain from doing any act; it could not be enforced, obeyed or disobeyed; it did not speak to the future or contemplate any future effect because, on and after the date it was made, it had no significance "except as a record of a certain completed act performed by the Commission."

The Supreme Court rejected the contention, saying at 300 U.S. 285, 57 S.Ct. 475:

... overemphasis upon the mere form of the order may not be permitted to obscure its purpose and effect. . . . Interpreted according to its purpose, the order is in substance and effect an affirmative one and therefore reviewable under the statute.

Finally the proceeding in the subject case and in Commission Docket No. MC-C-2, *New York, N.Y., Commercial Zone*, 1 M.C.C. 665, are startlingly similar from the standpoint of the judicial reviewability of the Commission's final order. Both were instituted as investigations by the Commission into the scope of the partial exemption of Section 203(b) of the Interstate Commerce Act—pertaining to agricultural commodities within the meaning of subparagraph (6) in the former and to the

New York Commercial Zone within the meaning of subparagraph (8) in the latter. Neither proceeding was an adversary one. In both cases notice was given only to the public; no carrier or carriers were named as respondents in the proceedings. In neither case was a carrier ordered to do or refrain from doing anything. In the light of these similarities the following discussion in *Charles Noeding Trucking Co. v. United States*, 29 F. Supp. 537, 543, reviewing the Commission's order in the latter case is particularly pertinent.

... if the determination of exemption within the meaning of Section 203(b)(8) is purely an administrative function of the Commission this court is without jurisdiction of the pending cause. It would follow therefore, if this be correct, that if the plaintiffs should refuse to comply with the regulations imposed by the Motor Carrier Act while operating in the territory covered by the Commission's order the Commission would then be required to make a further order upon the plaintiffs to require them to comply with the regulatory provisions of the Act. Section 222(a) of the Act, 49 U.S.C.A. §322(a), however, provides that a penalty may be imposed upon any motor carrier which shall knowingly and wilfully violate any provision of the Act or any rule, regulation or order promulgated thereunder.

The plaintiffs take the position that they are not required to incur penalties in order to test the validity of the exempt zone created by the Commission's order. They urge that the right to institute the pending suit is conferred upon them by the provisions of Section 205(b) of the Motor Carrier Act, 49 U.S.C.A. §305(h). This provides that "Any final order made under this chapter shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under Chapter 1 of this title." The right given to an interested party to review the orders of the Commission conferred by Section 208 of the Judicial Code (28 U.S.C.A. §46) is therefore car-

ried over into the Motor Carrier Act. The word "final" however is used to qualify the phrase "Any . . . order" occurring in Section 205(h). We therefore must first determine whether or not the order here made by the Commission is in its nature a final order. If it is such it follows, we think, that it was made in a "proceeding", within the meaning of Section 205(f) of the Motor Carrier Act.

We conclude that the order sub judice is a final order for since it at last defines the exempt zones and purports to remove the qualified exemption from certain municipalities which are in fact contiguous within the meaning of Section 203(b)(8) (for example Perth Amboy, Carteret, Linden and Elizabeth are physically contiguous to Richmond save only for the interposition of the Arthur Kill), its effect is to subject such carriers as do not comply with the regulations imposed by the Act to the penalties prescribed by the Act. The Commission's order therefore withdraws from the plaintiffs that partial immunity from regulation which they acquired by reason of the provisions of Section 203(b)(8). As was stated by the Supreme Court in the case of *Powell v. United States*, 300 U.S. 276, 285, 57 S.Ct. 470, 475, 81 L.Ed. 643, ". . . overemphasis upon the mere form of the order may not be permitted to obscure its purpose and effect." It cannot be denied that the plaintiffs have a pecuniary interest in the order and are affected substantially by its provisions. We deem a final order to be one which ends the action or proceeding before the tribunal which makes it, leaving nothing further to be determined by that tribunal or required to be accomplished other than the administrative execution of the decision. A correct analogy to this phase of the case at bar is supplied by those cases which deal with the rate making powers of the Commission for other interstate carriers. See *United States v. Los Angeles & S.L.R. Co.*, 273 U.S. 299, 309, 47 S.Ct. 413, 71 L.Ed. 651; *Procter & Gamble Co. v. United States*, 255 U.S. 282, 293, 32 S.Ct. 761, 56 L. Ed. 1091; *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 55 S.Ct. 462, 79 L. Ed. 1023.

In the case of *Rochester Telephone Corporation v. United States*, 59 S.Ct. 754, 758, 83 L. Ed. 1147, decided April 17, 1939, the Supreme Court, by Mr. Justice Frankfurter stated: " . . . where the Commission's order denies an exemption from the terms of the statute, as in the Intermountain Rate cases, 234 U.S. 476, 34 S.Ct. 986, 58 L.Ed. 1408, the road to the courts' jurisdiction seems to be clear. There is a constitutional 'case' or 'controversy,' *Interstate Commerce Commission v. Brimson*, 154 U.S. 447, 14 S.Ct. 1125, 38 L.Ed. 1047; the requirements of equity are satisfied if disregard of the Commission's adverse action entails threat of oppressive penalties; and the suit is within the express language of the Urgent Deficiencies Act, in that it is one 'to enjoin, set aside, annul' an 'order of said commission.' 28 U.S.C. Secs. 46, 47, 28 U.S.C.A. §§46, 47. While the penalties may be imposed by the statute for its violation and not for disobedience of the Commission's order, a favorable order would render the prohibitions of the statute inoperative." Nor is the jurisdiction conferred by the Urgent Deficiencies Act limited to suits by carriers to avoid statutory penalties. Such suits may be maintained by other parties in interest. See *Claiborne-Annapolis Ferry Co. v. United States*, 285 U.S. 382 [52 S.Ct. 440, 76 L.Ed. 808]; *Mississippi Valley Barge L. Co. v. United States*, 292 U.S. 282, 293 [54 S. Ct. 692, 78 L.Ed. 1260].

It is apparent, therefore, that the district court erred in declining to review the Commission's order in the *Determination* case. This court's decisions in the *El Dorado* and *Powell* cases, as well as the *Noeding* decision, furnish ample and reliable precedent sustaining the judicial review of such an order of the Interstate Commerce Commission.

2. The decision of the district court presents an inter-jurisdictional conflict.

The decision of the district court in the subject proceeding that the order of the Interstate Commerce Com-

mission is not judicially reviewable presents a conflict with the decision of the United States District Court for the Southern District of Florida, in *Florida Gladiolus Growers Ass'n. v. United States*, 106 F.Supp. 525. Sitting as a three-judge statutory court, the court reviewed the Commission's order in the *Determination* case and restrained the Commission from enforcing that portion of it which declared horticultural commodities not to be agricultural commodities within the scope of Section 203(b)(6).

An examination of the briefs indicates, as in the instant case, that no jurisdictional objection was raised by any of the parties. This circumstance, no doubt, detracts from the weight of this case as an authority on the procedural issue. On the other hand, the question whether an action presents a justiciable controversy is one that the courts may raise *sua sponte* in order that the judicial process may not be abused. *Rochester Telephone Corporation v. United States*, 307 U.S. 125, 128, 59 S.Ct. 754, 756. Consequently the assumption of jurisdiction in the *Florida Gladiolus* case may be construed as constituting at least some indication that an action may be maintained under circumstances similar to those in the case at bar. It is possible, indeed, that the point did not occur to the court, since the matter was not brought to its attention by counsel. In any event, tacit or negative though it be, it is the latest expression of that court on this point. *Union Producing Company v. Federal Power Commission*, 127 F.Supp. 88, 93.

The confusion that results from these conflicting positions should be dispelled by the reversal of the judgment of the district court in the subject proceeding and the remanding of the matter to the district court for disposition on the merits.

3. *The decision of the district court promotes instability and confusion in the motor carrier industry.*

The reviewability of the report and order of the Interstate Commerce Commission in the *Determination* case was questioned by none of the parties to the proceeding before the district court. The matter was introduced *sua sponte* by the court itself. As a matter of fact, when questioned by the court and subsequently on supplemental briefs, counsel for the several litigants, including the Interstate Commerce Commission, the Department of Justice and the Secretary of Agriculture of the United States, expressed the unanimous view that the report and order in the *Determination* case was such a final "order" as could be reviewed by the court.

It could be expected that the complainant before the district court, Frozen Food Express, which had been denied the relief sought, would note its appeal to this Court, and it has done so. Intervenor in complainant's behalf, the Secretary of Agriculture of the United States, until now has seen fit to rely on the complainant's action, and yet has not noted his appeal from the district court's judgment.

The defendant in the district court, the Interstate Commerce Commission, also has noted its appeal to this Court notwithstanding that its order, assailed by the complainant, was not disturbed by the district court's decision. Similarly, intervenors in behalf of the I.C.C., American Trucking Associations, Inc., and the Common Carrier Conference Irregular Route and Contract Carrier Conference thereof, have noted their appeal.

The seemingly anomalous position of the Interstate Commerce Commission and intervenors in its behalf of

appealing from a judgment that declined jurisdiction to disturb an order of the Commission results from the implications inherent in the district court's action. It leaves unsettled the question of what processed agricultural commodities are embraced within the partial exemption of Section 203(b)(6) of the Interstate Commerce Act and what commodities are beyond its scope. The district court in its opinion suggests that the complainant motor carrier should transport fresh and frozen meat, fresh and frozen dressed poultry, feathers, shelled nuts, and cotton seed hulls, among other products, without having therefor an I.C.C.-issued certificate of public convenience and necessity authorizing such transportation. The court says that the Commission likely will seek injunctive relief to restrain the transportation. At that time the legality of the Commission's determination of the exempt status of the affected commodities could be tried.

According to Commissioner John L. Rogers there were in the United States on February 1, 1950, approximately 40,000 haulers of agricultural commodities, farm supplies and fish operating in interstate commerce as compared to 20,042 Commission-regulated carriers of property. *Eastern Motor Express v. United States*, 103 F.Supp. 694, 702. It is conceivable that the Commission would be required to bring suit against each one of the agricultural haulers, or at least against as many of them as would be necessary to establish for each agricultural commodity in the various stages of production in which it may be transported by motor carriers in interstate commerce whether the transportation is or is not subject to Commission regulation.

In each of these numerous court proceedings there would necessarily be a trial *de novo* of the question of the agricultural exemption. In each proceeding the Com-

mission would be required to construct anew a record upon which a restraining order or a criminal conviction could be based. The enormity of the Commission's task defies comprehension.

Conflicts between the many district courts and the several circuit courts of appeal in the interpretation of Section 203(b)(6) inevitably will arise. Ultimately such conflicts will need to be resolved by the Supreme Court of the United States. However, even the Supreme Court will have difficulty evolving a comprehensive definition of the statutory language of Section 203(b)(6) since before it will simply be the records pertaining to a single agricultural commodity in a particular stage of production. Indicative of the problem that will be encountered by this Court is the petition for certiorari, denied by this Court October 14, 1954, in No. 264, *I.C.C. v. Allen E. Kroblin, Inc.*, which presented the question of whether *fresh dressed poultry* is an exempt agricultural commodity and the appeal in the companion case to the instant one, similarly captioned, which presents the question of whether *fresh and frozen dressed poultry* is such an exempt product.

Until these conflicts and doubts respecting the hundreds of processed agricultural commodities are resolved by this Court, the motor carrier industry will be in a state of uncertainty and confusion. Motor carriers which have certificates or permits authorizing the transportation of specified processed agricultural commodities will find their franchises to be valueless when non-regulated carriers carry identical products at will. The rate structure established by regulated carriers of agricultural commodities will crumble in the face of unrestrained rate cutting by non-regulated carriers holding themselves out to haul identical commodities. Shippers of agricultural commodities won't know from one day to the next which carriers are available for hauling their products and what rates

will be charged. Ultimately the agricultural community and the public in general will suffer.

Such confusion and delay pending the litigation of countless suits can be avoided by a review of the Commission's decision in the *Determination* case wherein the meaning of the statutory language of Section 203(b)(6) was comprehensively interpreted and a long, detailed list of agricultural commodities, processed but not to the point of being manufactured, was published. The Commission's findings, if sustained by court review, will have the force and effect of law, will command universal obedience, and will put to rest the question of the scope of the partial exemption of Section 203(b)(6).

CONCLUSION

For the foregoing reasons it is urged that jurisdiction be noted and that the judgment of the district court be reversed and the case remanded to the district court for disposition on the merits.

Respectfully submitted,

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APPENDIX A

**IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN
DISTRICT OF TEXAS
HOUSTON DIVISION**

FROZEN FOOD EXPRESS, Plaintiff

**EZRA TAFT BENSON,
SECRETARY OF AGRICULTURE
OF THE UNITED STATES,
Intervening Plaintiff**

vs.

**UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants**

**COMMON CARRIER IRREGULAR ROUTE
CONFERENCE OF AMERICAN TRUCKING
ASSOCIATION, ET AL,
Intervening Defendants**

CIVIL ACTION NO. 8285

and

CIVIL ACTION NO. 8396

**Phinney and Hallman (Carl L. Phinney), of Dallas,
Texas; for plaintiff.**

**Stanley N. Barnes, Ass't. Attorney General, and
Charles W. Bucy, Associate Solicitor, of Washington,
D. C.; for Intervening Plaintiff.**

**Malcolm R. Wilkey, United States Attorney, of Houston,
Texas, and Edward M. Reidy, Chief Counsel of Interstate
Commerce Commission, of Washington, D. C.; for De-
fendants.**

Callaway, Reed, Kidwell and Brooks (Rollo E. Kidwell), of Dallas, Texas; Todd, Dillon & Curtiss (Clarence D. Todd), of Washington, D. C.

Peter T. Beardsley, of Washington, D. C. Baker, Botts, Andrews and Shepherd (J. C. Hutcheson, III and Edwin N. Bell), of Houston, Texas; Macleay and Lynch (Francis W. McNerny), of Washington, D. C.

Reeder, Gisler & Griffin (Lee Reeder), of Kansas City, Missouri; J. W. Nisbet, of Chicago, Illinois; Carl Helmetag, Jr., of Philadelphia, Pa.; Rice, Carpenter & Carraway, of Washington, D. C.; Fulbright, Crooker, Freeman, Bates & Jaworski. (W. H. Vaughan, Jr.), of Houston, Texas; for Intervening Defendants.

JANUARY 26, 1955

Before HUTCHESON, Chief Circuit Judge, and CONNALLY and KENNERLY, District Judges.

CONNALLY, District Judge.

Filed pursuant to Secs. 1336, 1398, and 2321-2325, of Title 28; to Sec. 1009, of Title 5; and to Sec. 305(g), of Title 49 U.S.C.A., each of the foregoing civil actions attacks and seeks to restrain enforcement of an order of the Interstate Commerce Commission. Presenting the same question of law, and substantial identity of parties, the actions were consolidated for hearing and trial. The question for determination is whether a number of different commodities, as later noted herein, all of which have their origin on the farm or ranch, fall within the scope of the so-called agricultural exemption, Sec. 203(b) (6) of Part II of the Interstate Commerce Act (Title 49 U.S.C.A. § 301 et seq.). By terms of the last-mentioned statute, motor vehicles used in carrying property consist-

ing of "ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)", are exempt from Interstate Commerce Commission control (save for minor exceptions not here pertinent). The plaintiff in each of the consolidated actions, being a trucking concern holding a certificate of convenience and necessity from the Commission, desires to carry some or all of the commodities in question, unrestricted by the terms of its own certificate, or by other Commission regulation. Hence the plaintiff, supported to a considerable extent in this contention by the Secretary of Agriculture of the United States, urges upon the Court a broad interpretation of the statutory language "agricultural commodities (not including manufactured products thereof)", which would have the net result of enlarging this so-called agricultural exemption. The Commission, on the other hand, and those intervenors who align themselves with the Commission, urge upon us that most of the commodities in question, by virtue of the treatment and processing which they receive, either have lost their identity as "agricultural commodities", or have become "manufactured products thereof". The result of this argument is drastically to restrict the scope of the exemption.

Civil Action 8285:

In June, 1948, the Interstate Commerce Commission, of its own motion, instituted a proceeding, being MC-C-968 on its docket, in the nature of an investigation, to determine the meaning and scope of the term "agricultural commodities (not including manufactured products thereof)", as used in the above-mentioned statute. The proceeding was widely noticed in the affected trades and industries. Many interested parties, including the Secretary of Agriculture of the United States, the Commissioners of Agriculture from a number of the States, associations of shippers, motor carriers, and others, intervened.

After extended hearings, during which much expert testimony was offered as to the manner and method of cleaning, preparing, packaging, and otherwise processing the various commodities in question, the Commission issued its report and order entitled "Determination of Exempted Agricultural Commodities", 52 I.C.C. Reports, Motor Carrier Cases, 511-566. In such report, the Commission announced its definition of such statutory term,¹ which definition it then undertook to apply to the various commodities under consideration, and enumerated those which it found to come within the statutory language, and those which it found to fall without.² Thereupon, the

¹ "In No. MC-C-968, we find that the term 'agricultural commodities (not including manufactured products thereof)' as used in section 203(b) (6) of the Interstate Commerce Act means: Products raised or produced on farms by tillage and cultivation of the soil (such as vegetables, fruits, and nuts); forest products; live poultry and bees; and commodities produced by ordinary livestock, live poultry, and bees (such as milk, wool, eggs, and honey), but not including any such products or commodities which, as a result of some treatment, have been so changed as to possess new forms, qualities, or properties, or result in combinations."

² "We find that the term 'agricultural commodities (not including manufactured products thereof)' as used in section 203 (b) (6) includes: (1) fruits, berries, and vegetables which remain in their natural state, including those packaged in bags or other containers, but excluding those placed in hermetically sealed containers, those frozen or quick frozen, and those shelled, sliced, shredded, or chopped up; (2) fruits, berries, and vegetables dried naturally or artificially; (3) seeds, including inoculated seeds, but not seeds prepared for condiment use or those which have been deawned, scarified or otherwise treated for seeding purposes; (4) forage, hay, straw, corn and sorghum fodder, corn cobs, and stover; (5) (a) hops and castor beans, and (b) leaf tobacco, but excluding redried tobacco leaf; (6) raw peanuts, and other nuts, unshelled; (7) whole grains, namely, wheat, rye, corn, rice, oats, barley and sorghum grain, not including dehulled rice and oats, or pearled barley; (8) (a) cotton in bales or in the seed, (b) cottonseed and flaxseed, and (c) ramie fiber, flax fiber, and hemp fiber; (9) live poultry, namely, chickens, turkeys, ducks, geese, and guineas; (10) milk, cream, and skim milk, including that which has been pasteurized, standardized milk, homogenized milk and cream,

proceeding was terminated and removed from the Commission docket.

The plaintiff Frozen Food Express was not a party to the proceeding before the Commission. By amended complaint filed here July 12, 1954, plaintiff alleges that it desires to carry agricultural commodities (not including manufactured products thereof) for hire, to and from all points within the United States, irrespective of the limitations imposed by its own certificate; that the report of April 13, 1951, deprives plaintiff of its right to do so. Alleging that the action of the Commission, in entering the report in question, was arbitrary, capricious and unreasonable, that it constituted an abuse of discretion and a violation of the Commission's statutory powers, the plaintiff here seeks an injunction to restrain the Commission and the United States from enforcing or recognizing the validity of such report; restraining interference with the plaintiff's proposed transportation of such agricultural commodities (not including manufactured products thereof), and seeks an order of this Court declaring the report of the Commission of April 13, 1951, to be null and void.

The Secretary of Agriculture has intervened, denominating himself "Intervening Plaintiff". He makes common cause with plaintiff in contending that a number of

² (Cont'd.)

vitamin 'D' milk, and vitamin 'D' skim milk; (11) wool and mohair, excluding cleaned and scoured wool and mohair; (12) eggs, including oiled eggs, but excluding: whole or shelled eggs, frozen or dried eggs, frozen or dried egg yolks, and frozen or dried egg albumin; (13) (a) trees which have been felled and those trimmed, cut to length, peeled or split, but not further processed, and (b) crude resin, maple sap, bark, leaves, Spanish moss, and greenery; (14) sugar cane, sugar beets, honey in the comb, and strained honey."

commodities³ are within the exemption. Several trucking associations, and some sixty southern and western railroad companies, have intervened. These intervenors take a contrary view, and support the report of the Interstate Commerce Commission.

We are of the opinion that the action may not be maintained, and must be dismissed, for the reason that the report and order of the Interstate Commerce Commission of April 13, 1951, is not an "order" subject to judicial review under any of the statutes cited. The proceeding before the Commission was not an adversary one. The order which initiated it purported to do no more than direct that an investigation be made of the meaning of the statutory language. Notice was given only to the public. When the final report and order was forthcoming some two years later, the only "order" entered was one discontinuing the proceeding and removing it from the Commission's docket. The question is controlled by *U. S. v. Los Angeles & S. L. R. Co.*, 273 U.S. 299, 47 S.Ct. 413, 414, 71 L.Ed. 651, holding a very similar "order" of the Interstate Commerce Commission which found, after an investigation, the value of certain railroad properties, not to be subject to review. The language of Mr. Justice Brandeis, speaking for a unanimous Court there, aptly describes the order in issue here:

"The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege, or license; which does not extend or

³ "(1) Slaughtered meat animals and fresh meats;

(2) Dressed and cut-up poultry, fresh or frozen;

(3) Feathers;

(4) Raw shelled peanuts and raw shelled nuts;

(5) Hay chopped up fine;

(6) Cotton linters and cottonseed hulls;

(7) Frozen cream, frozen skim milk, and frozen milk;

(8) Seeds which have been deawned, scarified, or inoculated."

abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation."

The proponents of jurisdiction here rely upon *Columbia Broadcasting System v. U. S.*, 316 U.S. 407, 62 S.Ct. 1194, 86 L.Ed. 1563. It was there held that an order of the Federal Communications Commission promulgating certain rules and regulations requiring that the Commission deny a license to broadcasting stations under certain circumstances, was subject to judicial review, upon a showing by the complaining party of strong equitable considerations. This authority is clearly distinguishable from the present case. The order there in question was entered in the exercise of the agency's rule-making power. Such orders, together with those fixing rates and those determining controversies before the administrative body, have long been recognized as subject to review, *U. S. v. Los Angeles & S. L. R. Co.*, supra.

Likewise, the complaining party there showed an immediate and continuing threat of irreparable injury if the order were not reviewed. It is not so here. The statement of plaintiff that it desires to carry for hire most or all of the commodities on the Commission's proscribed list, and that if it does so, the Commission likely will seek injunctive relief to restrain plaintiff, shows no basis for the intervention of a court of equity. Plaintiff will have an adequate remedy in the event of such interference.

It follows that Civil Action 8285 will be dismissed.
Civil Action 8396:

A complaint was filed December 23, 1953, with the Interstate Commerce Commission by East Texas Motor Freight Lines, Gillette Motor Transport, Inc., and Jones Truck Lines, Inc., charging that Frozen Food Express was and had been engaged in transporting fresh and frozen dressed poultry, and fresh and frozen meats, and meat products, for hire, between points in interstate commerce not authorized by its certificate of convenience and necessity. Frozen Food readily admitted that it had been so engaged, but defended on the theory that such products all were within the agricultural exemption. The Commission found each of these products not to be within the exemption, and ordered Frozen Food Express to cease and desist from such unauthorized transportation. The present proceeding was filed by Frozen Food Express to review that order.*

While the present action was pending in this Court, the Secretary of Agriculture of the United States filed with the Commission his petition for leave to intervene, pursuant to Sec. 1291, of Title 7 U.S.C.A. This request was denied; and the Secretary appears here as "Intervening Plaintiff", contending (1) that the proceedings before the Commission were null and void by reason of the failure of the Commission to notify him of the pendency thereof, Sec. 1291(a), of Title 7 U.S.C.A.; (2) that the proceedings should be remanded to the Commission by reason of its error of law in having denied him leave to intervene; and (3) that the cease and desist order should be enjoined by reason of the alleged error of the Commission in holding fresh and frozen meats, and fresh and frozen dressed poultry, to be beyond the limits of the agricultural exemption.

* Plaintiff has abandoned the contention that meat products are within the agricultural exemption, and this commodity will not be further considered here.

The rail carriers and trucking associations which intervened in Civil Action 8285, also appear in this action. They support the Commission, and oppose the position taken by the plaintiff and the Secretary of Agriculture.

Armour & Company, being engaged at various points in the United States in the slaughter of livestock and the killing, dressing, and sale of poultry, has intervened, urging that dressed poultry is an exempt commodity, that meat is not.

The position taken by the Secretary of Agriculture that the proceeding before the Commission was null and void in its entirety by reason of the failure of the Commission to give him notice thereof, need not long detain us. The proceeding there was not one with respect to "rates, charges, tariffs, and practices" relating to the transportation of farm products, and hence was not one of which the Secretary was entitled to notice under the statute. Secs. 1291 and 1622, of Title 7 U.S.C.A. *U. S. v. Pennsylvania R. Co.*, 242 U.S. 208, 37 S. Ct. 95, 61 L.Ed. 251; *Baltimore & Ohio R. Co. v. U. S.*, 277 U.S. 291, 292, 48 S.Ct. 520, 72 L.Ed. 885; *Missouri Pac. R. Co. v. Norwood*, 283 U.S. 249, 51 S.Ct. 458, 75 L.Ed. 1010. The Commission likewise did not commit an error of law in denying the Secretary's Petition of Intervention, filed there while the present proceeding was pending here.

Most able and exhaustive treatment is given the question now before us, in so far as it concerns dressed poultry, by Judge Gavin of the United States District Court for the Northern District of Iowa, in *Interstate Commerce Commission v. Allen E. Kroblin, Inc.*, 113 F. Supp. 599, 600, affirmed, 8 Cir., 212 F.2d 555, certiorari denied 348 U.S. 836, 75 S.Ct. 49. Reviewing the long struggle between the Interstate Commerce Commission in its efforts to restrict the application of the exemption in question, and the Department of Agriculture and others

in seeking to expand it; reviewing the legislative history of the Motor Carrier Act of 1935, and various proposed amendments thereto; and considering the congressional intent which prompted the insertion of the agricultural exemption, Judge Gavin concluded that dressed poultry constituted an "agricultural commodity", and did not constitute a "manufactured product thereof". Hence, such commodity was within the exemption. It is sufficient to state that we agree with those conclusions as to fresh and frozen dressed poultry.

Counsel for the Commission urges that this Court should disregard the Kroblin case, on the argument that the only question before us is one of the adequacy of the evidence before the Commission. It is said that the order which was entered was one within the general purview of the Commission's authority, and that if its findings are supported by "substantial evidence", this Court has no alternative but to leave it undisturbed. While we do not quarrel with such statement as a general proposition of law, the argument is not convincing in its application to the present record. The primary facts before the Commission were without dispute and were the subject of stipulation. Reduced to simplest form, they showed that before a chicken or duck became "dressed poultry", the bird was killed, his feathers and entrails removed, he was chilled, and in some cases frozen, packaged, etc. In addition, such "facts" consisted of evidence of so-called "expert" nature, that this treatment or processing of the chicken or duck rendered him a "manufactured product".

It is apparent that there is only one ultimate finding called for, namely, whether under the type of processing reflected by the record, the product falls within the statutory definition. The question then is a mixed one of law and fact, calling for the application of the processes of legal reasoning and of principles of statutory construction. The fact that the Commission's findings are

supported by an "expert" who gives his opinion that a dressed chicken is a manufactured product, does not foreclose the question, nor remove it from the scope of judicial review. *Baumgartner v. U. S.*, 322 U.S. 665, 64 S.Ct. 1240, 88 L.Ed. 1525; *Lehmann v. Acheson*, 3 Cir., 206 F.2d 592; *Galena Oaks Corp. v. Scofield*, 5 Cir., 218 F.2d 217.

In our opinion, fresh and frozen meat does not fall within the category either of "ordinary livestock" or of "agricultural commodities", and hence is not within the exemption. Since the enactment of Part II of the Interstate Commerce Act in 1935, motor vehicles used exclusively in carrying "livestock, fish (including shell fish), or agricultural commodities (not including manufactured products thereof)", have been exempt. By amendment in 1940, the term "ordinary" was inserted immediately before the word "livestock". The term "ordinary livestock" is defined in Sec. 20(11) of the Act as "all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses".

Referring only to the live animals, "ordinary livestock" may not be tortured to include the carcasses of slaughtered meat animals, or the meat which is the product of butchering. Meat has been regarded generally in the industry as a controlled commodity for some twenty years. Congress has dealt with the agricultural exemption on many occasions. Considering the ease with which the Congress might have added appropriate language to evidence its intent to exempt fresh or frozen meat from Interstate Commerce Commission control, if it so desired the absence of such language indicates that no such intent was entertained.

Nor may meat, fresh or frozen, be considered an "agricultural commodity" for present purposes. The exemp-

tion has treated the live meat animal in a separate generic class from "agricultural commodity" since the enactment of the statute; and if the live animal, on entering the slaughter pen or the packing house, is not an "agricultural commodity", we are unable to see how he becomes one on emerging therefrom in the form of beef or pork. The Commission was correct, in our opinion, in holding fresh and frozen meat to be non-exempt.

The enforcement of the order of the Interstate Commerce Commission, MC-C-1605, East Texas Motor Freight Lines, Inc., et al. v. Frozen Food Express, is enjoined and restrained in so far as said order interfered with, enjoins or restrains the plaintiff Frozen Food Express from transporting fresh and frozen dressed poultry in interstate commerce (when the motor vehicles used in carrying such poultry are not used for carrying any other property or passengers for compensation). Other relief sought by plaintiff is denied.

Clerk will notify counsel.

KENNERLY, District Judge (concurring in part and dissenting in part).

I concur with all the foregoing opinion except the decision in Civil Action 8396 with respect to fresh meat and frozen meat. As to that I respectfully dissent.

I think all of Section 303(b) should be given a broad and liberal construction, and that Section 303(b) (6) should be construed as including fresh meat and frozen meat. I think we should not only follow the reasoning of both the District Court and Court of Appeals in the Kroblin case with respect to dressed poultry and frozen dressed poultry, but that what is said is also applicable to fresh meats and frozen meats.

APPENDIX B**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

FROZEN FOOD EXPRESS, ET AL.,
Plaintiffs,

v.

**UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
ET AL.,** *Defendants.*

Civil Action No. 8285

Judgment

This action, to enjoin and set aside an order of the Interstate Commerce Commission, having come on for final hearing on November 16, 1954, before a duly constituted three-judge District Court, convened pursuant to Sections 2284 and 2321-2325, Title 28, United States Code, consisting of the undersigned judges; and the Court having considered the pleadings and evidence, and the briefs and arguments of counsel for the respective parties, and being fully advised in the premises; and having on January 26, 1955, filed herein its opinion, holding that the order sought by the plaintiffs to be set aside and enjoined is not an order subject to judicial review under any of the said statutes; now, in accordance with the said opinion, it is hereby

ORDERED, ADJUDGED, AND DECREED that the relief prayed for by the plaintiffs, including the Secretary of Agriculture as an intervening plaintiff, be, and

the same hereby is, denied, and their complaints be, and
the same hereby are, dismissed.

This the 23rd day of February, 1955.

/s/ JOSEPH C. HUTCHESON, JR.
Chief Judge, United States
Court of Appeals for the
Fifth Circuit

/s/ THOMAS M. KENNERLY
United States District Judge

/s/ BEN C. CONNALLY
United States District Judge

No. 8285

JUN 17 1955

HAROLD S. KELLEY, CLERK

IN THE
United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Case No. 8285.

FROZEN FOOD EXPRESS, et al.,

Plaintiff;

v.

**UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, et al.,**

Defendants.

**STATEMENT OF JURISDICTION OF THE CLASS I
RAILROADS, INTERVENING DEFENDANTS.**

MARGARET P. ALLEN,
EDWIN N. BELL,
JOSEPH H. HAYS,
CARL HELMETAG, JR.,
JAMES W. NISBET,
CHARLES P. REYNOLDS,

*Attorneys for Class I Railroads,
Intervening Defendants.*

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Filed: June 17, 1955

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IN THE
United States District Court
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Case No. 8285.

FROZEN FOOD EXPRESS, ET AL.,
Plaintiff,

v.

UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, ET AL.,
Defendants.

In compliance with Rule 13, paragraph 2, of the Revised Rules of the Supreme Court of the United States, the appellant Class I Railroads (intervening defendants in the above-styled action), hereinafter referred to as Railroads, submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the order and judgment of the District Court of three judges entered in this cause. A list of the individual defendant railroads is attached hereto as Appendix A.

OPINION BELOW

The opinion of the United States District Court for the Southern District of Texas, Houston Division, has not yet been reported. Copies of the opinion and final judgment are attached hereto as Appendix B-1 and B-2 respectively.

JURISDICTION**(1)**

This proceeding was instituted to enjoin and set aside certain orders of the Interstate Commerce Commission, pursuant to the requirements of 5 U. S. C. A. § 1109; 28 U. S. C. A. §§ 1336, 1398, 2321-2325 and 49 U. S. C. A. § 305(g). The cause was heard by a District Court of three judges in accordance with the requirements of 28 U. S. C. A. § 2325.

(2)

The Court below held that the determination of the Commission in *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511 (1951) was not an order subject to judicial review and denied relief to the plaintiff and the intervening plaintiff by dismissing their complaints in its judgment entered on February 23, 1955. A Notice of Appeal from this judgment was filed in the United States District Court for the Southern District of Texas, Houston Division, on April 19, 1955.

(3)

Jurisdiction of a direct appeal from a three judge court is vested in the Supreme Court by Statute. 28 U. S. C. A. §§ 1253 and 2101(b).

(4)

The jurisdiction of the Supreme Court of a direct appeal from a three judge district court is also supported by numerous cases such as *United States v. B. & O. R. Co.*, 333 U. S. 169 (1948) and *I. C. C. v. Hoboken R. Co.*, 320 U. S. 368 (1943) and the determinations in 52 M. C. C. 511 are reviewable both as final orders and as interpretative rules, *Columbia Broadcasting System v. United States*, 316 U. S. 407 (1942); *American Trucking Associations v. United*

States, 344 U. S. 298 (1953). Furthermore, that the dismissal of the action in the Court below was not a "favorable decision" which would preclude the defendant railroads from appealing herein has been established in a line of cases beginning with *Cornberg v. Troy Iron and Nail Factory*, 56 U. S. 451 (1853), since the relief which they sought, and that to which they were entitled, was a review on the merits of the Commission's determinations, which relief was denied by the Court below.

THE QUESTION RAISED ON APPEAL

Whether the district court was in error in holding that the report of the Interstate Commerce Commission in *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511 (1951), hereinafter sometimes referred to as the *Determination Case*, was not subject to judicial review, either as an "order" within the meaning of the Interstate Commerce Act, or as interpretative rule making under the Administrative Procedure Act? In that proceeding the Commission, after extensive hearings and mature and careful consideration, determined which of several commodities could be transported within the exemption of Section 203(b)(6) of the Interstate Commerce Act (49 U. S. C. A. 303(b)(6)) and which could be transported only in compliance with the regulatory provisions of the Act.

STATEMENT OF CASE

Section 203(b)(6) of the Interstate Commerce Act, as in force at the time material herein, exempted from the regulatory provisions of that Act, with certain exceptions in respect to safety and hours of service which are not here relevant, "motor vehicles used in carrying . . . agricultural commodities (not including manufactured products thereof)." Because of confusion as to the coverage of this exemption from economic regulation, the Commission, in June, 1948, instituted a proceeding on its own motion, docketed as MC-C-968 which was an investigation into and concerning the meaning of the term "agricultural commodities" as used in the above section and to determine whether certain individual commodities or classes of commodities fell within the partial exemption. This proceeding was widely publicized and noticed, and many interested parties intervened including shippers, rail and motor carriers, farmers' organizations, agricultural marketing associations and representatives of the Department of Agriculture, and of a large number of states.

Extended hearings were held before one of the Commission Examiners at which much evidence was submitted and expert testimony was given pertaining to the nature of a large number of commodities and to the processes and treatments to which such commodities are subjected prior to their shipment. Following the submission of testimony and briefs, the Examiner formulated definitions of "agricultural products" and "manufactured products thereof" and issued a recommended report and order in which he classified some of the commodities under one definition and some under the other.

Exceptions were taken to the Examiner's report and the case was heard by the Commission on oral argument. Thereafter the Commission formulated its definitions of the terms "agricultural commodities" and "manufactured products thereof" and, by applying these definitions to the commodities in question, made extensive findings enumerat-

ing which of the commodities under consideration were included within the term "agricultural commodities", and thus exempt, and which were "manufactured products" and thus subject to regulation.

These findings were embodied in the Commission's report entitled *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511 (1951) and, upon its issuance, the Commission entered its order which incorporated the findings and, as is the usual practice of the Commission when investigations are completed by the formulation of definitive determinations, discontinued the proceedings.

The plaintiff, Frozen Food Express, filed a complaint in July, 1954, against the Commission and the United States, alleging that it desired to transport, irrespective of the limitations of its certificate, certain agricultural commodities and that the above report of the Commission deprived it of its right to do so. Plaintiff further alleged that the Commission's action with respect to certain enumerated commodities was arbitrary, capricious, and was in violation of its statutory powers, and prayed that the report be declared null and void, and that the Commission be enjoined from enforcing its order and from interfering with plaintiff's proposed transportation. The Secretary of Agriculture intervened as plaintiff in support of the contentions with respect to some, but not all, of the enumerated commodities.

In its answer the Interstate Commerce Commission took the position that its order was lawful in every respect and should be upheld. The United States answered to the effect that the order should be upheld except as to certain named commodities. Several trucking associations and a number of eastern, southern, and western railroads intervened as defendants in support of the report of the Commission.

The district court dismissed the above complaints, holding that the determination of the Commission did not constitute an order subject to judicial review. It is from this judgment of the district court that this appeal is taken.

THE SUBSTANTIALITY OF THE QUESTIONS

The issues in this case and in the companion case, No. 8396, being appealed herewith (which arose out of and is based upon the Commission's findings in the *Determination Case*), concern primarily the proper interpretation to be placed upon Section 203(b)(6) of Part II of the Interstate Commerce Act.* That section, often referred to in proceedings before the Commission and elsewhere as the "agricultural exemption", exempts from the economic regulatory powers of the Interstate Commerce Commission:

" . . . (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish) or *agricultural commodities (not including manufactured products thereof)*, if such vehicles are not used in carrying any other property, . . . for compensation." (Emphasis supplied.)

More particularly, Case No. 8285 presents the question of whether or not the order and report of the Commission establishing the Commission's interpretation of this Section are subject to judicial review.

The substantiality of this question lies in the fact that until the Commission's determinations in 52 M. C. C. 511 have been reviewed and held authoritatively to be either proper or improper, in whole or in part, the existing uncertainty concerning the commodities whose transportation is exempt from regulation will continue. That such a result would be detrimental and demoralizing to the entire transportation industry can best be seen by examining the nature of the problem, keeping in mind that this problem has already created manifold difficulties, inconveniences and trouble not only for the Commission, but for the subjects

* Because of this similarity of the questions of law involved, and the substantial identity of the parties, these actions were consolidated for trial in the court below. For this reason, there must of necessity be a certain repetition in the discussion of the two cases in their respective jurisdictional statements.

of regulation, including the motor carriers and the railroads, and for shippers and receivers of vast quantities of commodities which regularly move in the stream of commerce in this nation.

This problem of interpreting and applying the agricultural exemption in such a way as to give it its proper place in the scheme of regulation, and conforming it at the same time to the requirements of the national transportation policy, has had its genesis in the language used by Congress in stating the agricultural exemption. It is immediately apparent in examining the language of Section 203(b)(6) of the Act that Congress has used very broad and general language in describing the types of commodities having a farm origin which, when moving in for-hire transportation, are free of regulation and those which are subject to regulation. Assuming that Congress had a sound basis for exempting the for-hire transportation of farm produce and other things grown on the farm, in order to permit the farmer who owned a truck to share its use with other farmers and thus reduce their marketing costs, nevertheless, the language of Section 203(b)(6) indicates that this objective was not intended to interfere with for-hire transportation handling manufactured or processed agricultural items. The legislative history of the Section confirms this view.

From the very nature of the problem which involves the determination of literally an endless number of individual commodities, and from the general language used by Congress, it is most logical to conclude that Congress intended the Commission to establish the line of demarcation between those commodities having a farm origin that are to be exempt and those which are to move in regulated transportation. It is almost beyond imagination to think of any possible provision of law that by its very terms and by the inherent characteristics of the situation to which it is addressed, would more obviously call for a pattern of administrative interpretation than does Section 203(b)(6)

of the Interstate Commerce Act. If, after viewing the language of the Section in the light of the complexities of the situation with which it deals, there is any doubt as to this, the presence of the Section as part of an act providing a comprehensive scheme of regulation for one of the largest American industries should remove any vestige of doubt. Then too, it must never be forgotten that in 1940 Congress passed the National Transportation Policy which issued a firm mandate to the Commission to interpret and administer each and every section of all four parts of the Interstate Commerce Act so as to provide the nation with a sound and flourishing transportation system.

Even superficial analysis makes it apparent that the job of interpreting and administering the agricultural exemption is one that deals with a great deal more than the abstract or theoretical definitions of the term "agricultural commodities." The interpretation to be given the term ~~must~~ take into account an almost limitless number of practical considerations, relationships between commodities and the processes to which they are subjected, and, perhaps most important of all, the proper meshing of the exception with the other sections of the Act. It would seem, therefore, that any attempt to deal with the Section on a piecemeal basis—that is to determine independently whether a particular commodity is covered by the exemption—would almost certainly be doomed to failure. The history of the litigation before the courts and the Commission when this was attempted proves this to be the case.

Not only would it seem virtually impossible to deal intelligently with the exemption on a piecemeal basis, but it would also seem to be equally unsatisfactory to attempt to arrive at any interpretation without a rich and deep-rooted background into the many facets of the problem. Experience with, and fundamental understanding of, the many ramifications involved would seem to be an essential foundation upon which to build a pattern of interpretation

that would carry out the objectives of Congress, not only as stated in the exemption, but throughout the broad framework of the Act of which the agricultural exemption is one small but important part.

By 1948, the pressures of the initial administration of the regulation of motor carriers and of the war years were past and the Commission was able to address itself to the problem of the exemption on a full scale basis. By this time, the situation in the industry had become most confusing and troublesome not only to the Commission, but as well to the subjects of regulation and the great cross-section of the public dependent upon for-hire transportation. The harmful effects of the confusion and uncertainty that existed because there was no authoritative interpretation respecting the general applicability given to the term "agricultural commodities" and the correlative term "manufactured products thereof" extended throughout the nation. Piecemeal efforts on the part of the Commission and the Commission's staff to interpret these terms only added to the confusion and uncertainty.

A motor carrier desirous of transporting a particular commodity that had an agricultural origin, but which had received some processing, was faced with the unhappy alternatives of transporting such item beyond regulation and thus subjecting itself to lengthy and expensive litigation and possible criminal penalties for persisting in following a determination once made; or of incurring the expense of securing a certificate of convenience and necessity, publishing tariffs, and living within regulation and thus placing itself at a disadvantage in competing with other bolder carriers who elected to avoid regulation. The advantages of unbridled freedom in doing business beyond regulation outweighed the security of doing business under regulation, so that the growing tendency was for the carriers to resolve all doubt in favor of the non-regulated status. Because of this the number of carriers operating beyond regulation has increased rapidly. This in turn

created serious jeopardy to the financial well-being of motor carriers that had assembled large fleets of expensive equipment under the belief that their certificates of convenience and necessity gave them some degree of protection from excessive competition in the limited and defined areas in which they operated. Similarly, the investment of the nation's railroads, which for many years had hauled virtually all of the nation's agricultural production, and which in handling such traffic were subject to the full impact of regulation under Part I of the Act, was being seriously jeopardized and rendered less valuable by the growth of motor carriers claiming exemption from regulation by the terms of Section 203(b)(6) of the Act. Shippers and receivers too were being adversely affected by the uncertainty of the charges that would be assessed on commodities that originated on the farm, because in many instances marketing practices were largely tied in with, and closely related to, transportation charges.

The situation which was breaking down regulation and promoting fringe, and in some instances deep-seated, violations of the Act, was one that called for broad scale Commission action, for the Commission is the agency to which Congress has given the responsibility not only of making effective the elaborate regulatory scheme of the Interstate Commerce Act, but also of carrying out the regulatory processes to promote a sound national transportation system adequate to handle the need of the nation's commerce at all times. In 1948 the Commission, having become fully aware of the situation as it existed, [and being for the first time in a position to undertake a far-reaching investigation] embarked upon a proceeding having as its objective the interpretation of the agricultural exemption and the classification of specific commodities as being "agricultural commodities" with the result that their transportation would be exempt from regulation or as being "manufactured products thereof" with the result that their transportation would be subject to regula-

tion. This proceeding, generally known as the *Determination Case*, is entitled: *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511 (1951). It is this case which was before the court in No. 8285 and which the court held to be non-reviewable.

In the *Determination Case* the Commission made specific findings—some of which provided the basis for the complaint against Frozen Food Express, reviewed by the court below in No. 8396—which were carefully considered and formulated in an attempt to bring order out of what was, if not chaos, at least widespread confusion and uncertainty and a growing breakdown of regulation.

The approach of the Commission in attempting to solve the problem seems to have been one peculiarly well adapted to the scope and complexities of the situation as it existed, and one which produced a solution which, if permitted to become effective, will accomplish a great deal. But until the Commission's determinations are either authoritatively decided to be proper, or otherwise, the difficulties that have existed to date will in all likelihood be extended and made more complex to the detriment of the Commission itself, of carriers operating both under, and free of, regulation and of shippers and receivers utilizing for-hire transportation.

Precisely what the Commission did in the *Determination Case* was to undertake the promulgation and prescription of interpretative rules as that term is found and used in the Administrative Procedure Act, although nowhere in the Commission proceedings is the term "interpretative rules" as such used. But, of course, legal or quasi-legal proceedings are appraised and judged in the light of what they actually are, what they seek to accomplish, and what they appear to do, and not what they are said to be.*

* That the Commission itself viewed its determinations in the *Determination Case* as rules which were to govern future applications of the exemption is clear from the recent Commission decisions in *East Texas Motor Freight Lines, Inc. v. Frozen Food Express*, Docket No. MC-C-1605 (July 1954) and *Allen Kloblin, Inc. Extension—Dairy Products*, Docket No. MC-70252 (Sub.

The Commission, by widespread notices which were well known to those in the transportation industry and to all individuals interested in the transportation of agricultural products, assigned for hearing before one of its examiners an investigation to determine what commodities were agricultural products within the meaning of Section 203(b)(6) of the Act. At the hearing all that had any interest in the problem were permitted to be heard and the Examiner, after receiving briefs from some of the parties, issued a recommended report and order. In this tentative report and order, the Examiner reviewed the history of the exemption, summarized the evidence he had received, made an extensive analysis of the legal precedents that might have been of assistance in determining what interpretation should be given to the Section, and then recommended that the Commission find that specific items were within the exemption and that others were not.

This recommended report and order received similar widespread circulation, was the subject of considerable comment by the trade journals circulated in the transportation business, and was generally available to those who desired to examine it. Thereafter, several persons filed exceptions to the Examiner's recommendation and replies thereto were filed in some instances.

Before reaching any decision on the Examiner's recommendation, the Commission held oral arguments. The Commission, after consideration of all that had gone before, issued its report and order. Again, as had the Examiner, the Commission reviewed the legislative history of the agricultural exemption, the cases in the courts dealing with it and comparable, but not substantially similar, provisions in other statutes, and the evidence and pleadings

No. 5) (April 1955). In both of these cases the Commission relied on its findings in the *Determination Case* and refused to be bound by either the *Kroblin case* (I.C.C. v. Kroblin, 113 F. Supp. 599 (N.D. Iowa 1953) aff'd, 212 F.2d 555 (8th Cir. 1954)), or the lower court decision in the *Frozen Food Case* which is being appealed herewith, (*Frozen Food Express v. United States*, Civ. Action No. 3936 (E.D. Texas 1955)), pending more authoritative determinations on appeal.

submitted before the Examiner. Upon this review, the Commission reached the conclusion that the primary purpose and objective of the agricultural exemption was to aid the farmer to market crops raised on the farm, and that it was not intended to provide a wholesale exemption from economic regulation for all commodities that had an origin on the farm.

The Commission arrived at a definition of the term "agricultural commodities" which would in its opinion carry out the purposes of Congress as it believed those purposes existed. This definition was, 52 M. C. C. 511, 557:

"... we find that the term 'agricultural commodities (not including manufactured products thereof)' as used in section 203(b)(6) of the Interstate Commerce Act means: Products raised or produced on farms by tillage and cultivation of the soil, (such as vegetables, fruits, and nuts); forest products; live poultry and bees; and commodities produced by ordinary livestock, live poultry and bees (such as milk, wool, eggs, and honey), but not including any such products or commodities which, as a result of some treatment, have been so changed as to possess new forms, qualities, or properties, or result in combination."

On the basis of this definition, the Commission found that particular items, for example, fruits, berries and vegetables, were included in the term "agricultural products" and that other items, particularly those having extensive processing, for example, fruits, berries and vegetables packaged in hermetically sealed containers, were not agricultural commodities. Having made such determinations with respect to a vast number of commodities, the Commission, as is its usual practice in general investigations that have been brought to a close as contrasted with those conducted on a continuing or extended basis, issued an order discontinuing the proceedings.

Now, no matter what can be said regarding the soundness of the individual determinations made by the Commission, this much seems beyond controversy: *First*, no one has complained that the Commission procedure leading to the ultimate determinations in the *Determination Case* were unfair, prejudicial, or inadequate. As a matter of fact, based on the requirements of the Administrative Procedure Act respecting rule-making and interpretative rule-making, it would seem that the Commission procedures offered greater safeguards and more ample opportunities to be heard than the minimum standards established for adequate administrative procedure. *Secondly*, and far more important, the individual determinations of the Commission, whether approved by this Court, or found by this Court to be improper, will bring certainty and clarity into a field where it has at no time existed. By the same token, so long as the determinations of the Commission are regarded as outside of the orbit of court review, the confusion and uncertainty that presently exists will worsen to the point where broad areas of the Commission's regulatory sphere will be cast into shadow.

But the need and desirability of this Court's consideration and examination of the decision of the court below, holding that the Commission's order in the *Determination Case* is not reviewable, does not depend solely upon the importance of validating or striking down particular determinations of the Commission so as to simplify and make less confusing the business affairs of a large and important segment of the transportation industry, although certainly, that alone should be persuasive. In addition to the uncertainty and indefiniteness brought about by the broad language of the statute which, as said before, the Commission has attempted to eliminate, there are conflicting court decisions in the several circuits that add to and magnify the difficulties which have been already referred to. Without in any way condemning these several courts, for admittedly the problems with which they were confronted

were intricate and without landmarks to guide solution, their opinions dealing with the agricultural exemption have not been very helpful in outlining any principle to be applied in interpreting the language used by Congress.

Unless this Court sees fit to announce the controlling principle governing the interpretation of this Section, the future seems to be one filled with expensive and time-consuming litigation to determine, on a piecemeal basis, whether an almost endless list of particular items that have an agricultural origin are within the scope of the exemption. And since such litigation may be brought in the various circuits of the nation, each of which has varying associations with, and different reactions to, the needs of agriculture, the likelihood of a consistent and clear pattern emerging from such a piecemeal approach is remote indeed. Especially is this the reasonable prognostication if the decisions to date are the basis of a future estimate.

Under these circumstances, it appears that the decision of the court below in Case No. 8285 holding that the order of the Commission in the *Determination Case* was not reviewable is one of the greatest import and one which if reversed will go a long way in bringing to an end a great deal of litigation that to date has been almost entirely unsatisfactory. As such, the issue is certainly a most substantial and important one and one ripe for decision by this Court.

It might well be asked how a decision by this Court, in view of the disturbed background of litigation before the courts and the Commission prior to the *Determination Case*, will work a solution. The answer lies in the fact that the key piece in what up to now has been an insoluble puzzle, the Appellant Railroads believe, the guiding principle or philosophy to be used in interpreting the agricultural exemption. Once this is authoritatively announced, the rest of the pieces will fall into line.

The Appellant Railroads believe that the precise and explicit determinations reached by the Commission in the *Determination Case* were made possible by the Commission's adoption of a principle of interpreting the Interstate Commerce Act which is well-grounded and supported in the decisions of this Court, and that the confusion which exists in the court cases has arisen because of a failure to recognize this principle of interpretation. This principle is a simple one, and one which if applied to the agricultural exemption eliminates much speculation and doubt. The guiding principle which these Appellant Railroads believe should be applied to the agricultural exemption is that announced by this Court in such cases as *Piedmont & N. Ry. Co. v. Commission*, 286 U. S. 299 (1932); *MacDonald v. Thompson*, 305 U. S. 263 (1938); *Gregg Cartage Co. v. United States*, 316 U. S. 74 (1942) and *Crescent Express Lines v. United States*, 320 U. S. 401 (1943). It is to the effect that because of the great scope and complexities of the regulatory scheme of the Interstate Commerce Act and the many and extensive powers of the Commission which over the years have steadily been increased, all exemptions from regulation should be strictly construed so as to preserve and enhance regulation rather than whittling it down or eroding it. Were this Court to hold the *Determination Case* to be reviewable and to hold further that the application of this principle of interpretation to the agricultural exemption is proper, it is the firm belief of these Appellant Railroads that a detailed review of the Commission's findings respecting individual commodities, by a lower court, would establish beyond all doubt that the Commission's interpretation of the term "agricultural products" and its classifications of the individual commodities in the *Determination Case* were proper. Were this to be done, the confusion that now exists would largely disappear and the Commission could carry out the detailed administration of the agricultural exemption as Congress intended. Similarly, a holding by this Court that the *De-*

termination Case is reviewable and the announcement of a different principle of interpretation to be applied to the agricultural exemption, would enable the Commission under a changed version of the law, to classify commodities having a farm origin as either exempt or non-exempt. In either event, the all-important step that must be taken to establish a comprehensive classification of the endless list of commodities that have a farm origin would be given a tremendous lift, even though this might necessitate—contrary to the views and beliefs of these Appellant Railroads—the beginning of a new determination case by the Commission. Either of these solutions, which depend on this Court's considering the matter, is much to be desired as contrasted with the piecemeal treatment that has not brought, and cannot bring about, sound conditions in the transportation industry and which will of necessity continue if this Court declines to consider these appeals.

CONCLUSION

The Appellant Railroads respectfully submit that the Supreme Court has jurisdiction to review this decision by direct appeal from the District Court under the statutory provisions and the cases cited above. The Appellants further submit that the issues presented by this case are of the requisite substantiality to warrant decision by the Supreme Court. The primary question in this case involves the reviewability of the Commission's determinations in the *Determination Case* and the rule of interpretation which is properly to be placed upon Section 203(b)(6) of the Interstate Commerce Act which exempts motor carriers transporting agricultural products from the economic regulatory powers of the Interstate Commerce Commission. Until this issue is settled authoritatively, the confusion caused by the present lack of certainty and differences of approach in respect to this question will continue to impede the efforts of the Commission effectively to regulate

transportation in accordance with the purposes and policies of the Interstate Commerce Act and the National Transportation Policy and to project an element of uncertainty into the policies of carriers subject to the Act and of the shippers dependent upon them. The existing diversity of holdings among the lower courts emphasizes the need for a decision of this question by the Supreme Court in order that some definite principles of interpretation be authoritatively established which will enable the Commission to carry out its administration of the agricultural exemption in a manner consistent with the Act as whole.

Respectfully submitted,

MARGARET P. ALLEN,
EDWIN N. BELL,
JOSEPH H. HAYS,
CARL HELMETAG, JR.,
JAMES W. NISBET,
CHARLES P. REYNOLDS,

*Attorneys for Class I Railroad
Intervening Defendants.*

1740 Suburban Station Bldg.,
Philadelphia 4, Penna.

Filed: June 17, 1955.

CERTIFICATE OF SERVICE

I, Carl Helmetag, Jr., one of the attorneys for the Class I Railroads, intervening defendants (appellants) herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing Statement of Jurisdiction on the several parties to this action as follows:

1. On the plaintiff, Frozen Food Express, by mailing copies in duly addressed envelopes, with air mail postage prepaid, to its attorneys of record, Carl L. Phinney and Leroy Hallman, First National Bank Building, Dallas, Texas;

2. On the Secretary of Agriculture, as intervening plaintiff, by mailing copies in duly addressed envelopes, with postage prepaid, to his attorneys of record, Charles W. Bucy, Walter D. Matson, and Harry Ross, Office of the Solicitor, U. S. Department of Agriculture, Washington 25, D. C.;

3. On the Interstate Commerce Commission, defendant, by mailing copies in duly addressed envelopes, with postage prepaid, to its attorneys of record, Edward M. Reidy and Leo H. Pou, at the office of the Interstate Commerce Commission, Washington 25, D. C.;

4. On the United States of America, defendant, by mailing copies in duly addressed envelopes, with postage prepaid, to its attorneys of record, Honorable Stanley N. Barnes, Assistant Attorney General, and Messrs. James E. Kilday and Charles S. Sulliyann, Jr., U. S. Department of Justice, Washington 25, D. C.; by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to its attorney of record, Malcolm R. Wilkey, United States Attorney, Houston, Texas; and by mailing a copy in a duly addressed envelope, with postage prepaid, to the Solicitor General, Department of Justice, Washington 25, D. C.

Certificate of Service

5. On the several intervening defendants, by mailing copies in duly addressed envelopes, with postage prepaid, to their respective attorneys of record, to wit: David G. Macdonald and Francis W. McInerney, Commonwealth Building, 1625 K Street, N. W., Washington 6, D. C.; Peter T. Beardsley and Fritz Kahn, c/o American Trucking Associations, Inc., 1424 Sixteenth Street, N. W., Washington 6, D. C.; Dale C. Dillon and Clarence D. Todd, 944 Washington Building, Washington 5, D. C., and by mailing copies in duly addressed envelopes, with air mail postage prepaid, to Rollo E. Kidwell, 301 Empire Bank Building, Dallas, Texas; and Lee Reeder, 1012 Baltimore Avenue, Kansas City 5, Missouri.

This 17th day of June, 1955

CARL HELMETAG, JR.

APPENDIX "A"

LIST OF CLASS I RAILROADS

The below listed Railroads are the individual carriers which, together, are designated in the Statement of Jurisdiction as "Class I Railroads," the intervening defendants appealing herein. When used, the terms "Class I Railroads" or "Appellant Railroads" include each of these named Railroads:

Akron, Canton and Youngstown Railroad Company
The Ann Arbor Railroad Company
The Atchison, Topeka & Santa Fe Railway Company
Atlantic Coast Line Railroad Company
The Baltimore & Ohio Railroad Company
Bangor and Aroostook Railroad Company
Boston and Maine Railroad
Central of Georgia Railway Company
The Central Railroad Company of New Jersey
Chicago & Illinois Midland Railway Company
Chicago and Northwestern Railway Company
Chicago, Burlington & Quincy Railroad Company
Chicago, Great Western Railway Company
Chicago, Indianapolis and Louisville Railway Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago, Rock Island and Pacific Railroad Company
The Delaware and Hudson Railroad
The Delaware, Lackawanna and Western Railroad Company
The Denver and Rio Grande Western Railroad Company
The Detroit and Toledo Shore Line Railroad Company

Detroit, Toledo and Ironton Railroad Company
Duluth, South Shore and Atlantic Railway Company
(P. E. Solether, Trustee)
Elgin, Joliet and Eastern Railway Company
Erie Railroad
Florida East Coast Railway Company (John W. Martin, Trustee)
Fort Dodge, Des Moines & Southern Railway Company
Grand Trunk Railway System
Great Northern Railway Company
Green Bay & Western Railroad Company
Gulf, Mobile and Ohio Railroad Company
Illinois Central Railroad Company
The Kansas City Southern Railway Company
Lehigh and New England Railroad Company
Lehigh Valley Railroad Company
Maine Central Railroad Company
Midland Valley Railroad Company
The Minneapolis & St. Louis Railway Company
Minneapolis, St. Paul & Sault Ste. Marie Railroad Company
Missouri-Kansas-Texas Railroad Company
Missouri Pacific Railroad Company (Guy A. Thompson, Trustee)
The Nashville, Chattanooga & St. Louis Railway
New York Central System
The New York, Chicago & St. Louis Railroad Company
The New York, New Haven & Hartford Railroad Company
New York, Ontario and Western Railway
New York, Susquehanna and Western Railroad Company
Norfolk and Western Railway
Northern Pacific Railway Company
The Pennsylvania Railroad Company
The Pittsburgh and West Virginia Railway Company
Reading Company

St. Louis-San Francisco Railway Company
St. Louis Southern Railway Company
Seaboard Air Line Railroad Company
Southern Railway Company
Southern Pacific Company
The Texas and Pacific Railway Company
Toledo, Peoria & Western Railroad
Union Pacific Railroad Company
The Virginian Railway Company
Wabash Railroad Company
Western Maryland Railway
The Western Pacific Railroad Company

7
APPENDIX "B-1"

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 8285

and

Civil Action No. 8396.

FROZEN FOOD EXPRESS,

Plaintiff,

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES,

Intervening Plaintiff,

v.

**UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION,**

Defendants,

COMMON CARRIER IRREGULAR ROUTE CONFERENCE OF AMERICAN TRUCKING ASSOCIATION, ET AL.,

Intervening Defendants.

Phinney and Hallman (Carl L. Phinney), of Dallas, Texas;
for Plaintiff.

Stanley N. Barnes, Assistant Attorney General, and
Charles W. Bucy, Associate Solicitor, of Washington,
D. C.; for Intervening Plaintiff.

Malcolm R. Wilkey, United States Attorney, of Houston,
Texas, and Edward M. Reidy, Chief Counsel of Inter-
state Commerce Commission, of Washington, D. C.;
for Defendants.

Callaway; Reed, Kidwell & Brooks (Rollo E. Kidwell), of Dallas, Texas;

Todd, Dillon & Curtiss (Clarence D. Todd), of Washington, D. C.;

Peter T. Beardsley, of Washington, D. C.;

Baker, Botts, Andrews & Shepherd (J. C. Hutcheson, III and Edwin N. Bell); of Houston, Texas;

Macleay & Lynch (Francis W. McInerney), of Washington, D. C.;

Reeder, Gisler & Griffin (Lee Reeder), of Kansas City, Missouri;

J. W. Nisbet, of Chicago, Illinois;

Carl Helmetag, Jr., of Philadelphia, Pa.;

Rice, Carpenter & Carraway, of Washington, D. C.;

Fulbright, Crooker, Freeman, Bates & Jaworski (W. H. Vaughan, Jr.), of Houston, Texas; for Intervening Defendants.

JANUARY 26, 1955.

Before HUTCHESON, *Chief Circuit Judge* and CONNOLLY and KENNERLY, *District Judges*.

CONNALLY, *District Judge*:

Filed pursuant to Sees. 1336, 1398, and 2321-2325, of Title 28; to Sec. 1009, of Title 5; and to Sec. 305(g), of Title 49, U. S. C. A., each of the foregoing civil actions attacks and seeks to restrain enforcement of an order of the Interstate Commerce Commission. Presenting the same question of law, and substantial identity of parties, the actions were consolidated for hearing and trial. The question for determination is whether a number of different commodities, as later noted herein, all of which have their origin on the farm or ranch, fall within the scope of the so-called agricultural exemption (Sec. 303(b)(6)) of Part II of the Interstate Commerce Act (Title 49, U. S. C. A., Sec. 301,

et seq.). By terms of the last-mentioned statute, motor vehicles used in carrying property consisting of "ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)", are exempt from Interstate Commerce Commission control (save for minor exceptions not here pertinent). The plaintiff in each of the consolidated actions, being a trucking concern holding a certificate of convenience and necessity from the Commission, desires to carry some or all of the commodities in question, unrestricted by the terms of its own certificate, or by other Commission regulation. Hence the plaintiff, supported to a considerable extent in this contention by the Secretary of Agriculture of the United States, urges upon the Court a broad interpretation of the statutory language "agricultural commodities (not including manufactured products thereof)", which would have the net result of enlarging this so-called agricultural exemption. The Commission, on the other hand, and those intervenors who align themselves with the Commission, urge upon us that most of the commodities in question, by virtue of the treatment and processing which they receive, either have lost their identity as "agricultural commodities", or have become "manufactured products thereof". The result of this argument is drastically to restrict the scope of the exemption.

CIVIL ACTION 8285.

In June, 1948, the Interstate Commerce Commission, of its own motion, instituted a proceeding, being MC-C-968 on its docket, in the nature of an investigation, to determine the meaning and scope of the term "agricultural commodities (not including manufactured products thereof)", as used in the above-mentioned statute. The proceeding was widely noticed in the affected trades and industries. Many interested parties, including the Secretary of Agriculture of the United States, the Commissioners of Agri-

culture from a number of the States, associations of shippers, motor carriers, and others, intervened. After extended hearings, during which much expert testimony was offered as to the manner and method of cleaning, preparing, packaging, and otherwise processing the various commodities in question, the Commission issued its report and order entitled "Determination of Exempted Agricultural Commodities" (52 I. C. C. Reports, Motor Carrier Cases, 511-566). In such report, the Commission announced its definition of such statutory term,¹ which definition it then undertook to apply to the various commodities under consideration, and enumerated those which it found to come within the statutory language, and those which it found to fall without.² Thereupon, the proceeding was terminated and removed from the Commission docket.

1. "In No. MC-C-968, we find that the term 'agricultural commodities' (not including manufactured products thereof) as used in section 203(b) (6) of the Interstate Commerce Act means: Products raised or produced on farms by tillage and cultivation of the soil (such as vegetables, fruits, and nuts); forest products; live poultry and bees; and commodities produced by ordinary livestock, live poultry, and bees (such as milk, wool, eggs, and honey), but not including any such products or commodities which, as a result of some treatment, have been so changed as to possess new forms, qualities, or properties, or result in combinations."

2. "We find that the term 'agricultural commodities' (not including manufactured products thereof) as used in section 203 (b) (6) includes: (1) fruits, berries, and vegetables which remain in their natural state, including those packaged in bags or other containers, but excluding those placed in hermetically sealed containers, those frozen or quick frozen, and those shelled, sliced, shredded, or chopped up; (2) fruits, berries, and vegetables dried naturally or artificially; (3) seeds, including inoculated seeds, but not seeds prepared for condiment use or those which have been deawned, sacrificed or otherwise treated for seeding purposes; (4) forage, hay, straw, corn and sorghum fodder, corn cobs, and stover; (5) (a) hops and castor beans, and (b) leaf tobacco, but excluding redried tobacco leaf; (6) raw peanuts, and other nuts, unshelled; (7) whole grains, namely, wheat, rye, corn, rice, oats, barley and sorghum grain, not including dehulled rice and oats, or pearled barley; (8) (a) cotton in bales or in the seed, (b) cottonseed and flaxseed, and (c) ramie fiber, flax fiber, and hemp fiber; (9) live poultry, namely, chickens, turkeys, ducks, geese, and guineas; (10) milk, cream, and skim milk, including that which has been pasteurized, standardized milk, homogenized milk and cream, vitamin 'D' milk, and vitamin 'D' skim milk; (11) wool and mohair, excluding cleaned and scoured wool and mohair; (12) eggs, including oiled eggs, but excluding: whole or shelled eggs, frozen or dried eggs, frozen or dried egg yolks, and frozen or dried egg albumin; (13) (a) trees which have been felled and those trimmed, cut to length, peeled or split, but not further processed, and (b) crude resin, maple sap, bark, leaves, Spanish moss, and greenery; (14) sugar cane, sugar beets, honey in the comb, and strained honey."

The plaintiff Frozen Food Express was not a party to the proceeding before the Commission. By amended complaint filed here July 12, 1954, plaintiff alleges that it desires to carry agricultural commodities (not including manufactured products thereof) for hire, to and from all points within the United States, irrespective of the limitations imposed by its own certificate; that the report of April 13, 1951, deprives plaintiff of its right to do so. Alleging that the action of the Commission, in entering the report in question, was arbitrary, capricious and unreasonable, that it constituted an abuse of discretion and a violation of the Commission's statutory powers, the plaintiff here seeks an injunction to restrain the Commission and the United States from enforcing or recognizing the validity of such report; restraining interference with the plaintiff's proposed transportation of such agricultural commodities (not including manufactured products thereof), and seeks an order of this Court declaring the report of the Commission of April 13, 1951, to be null and void.

The Secretary of Agriculture has intervened, denominating himself "Intervening Plaintiff". He makes common cause with plaintiff in contending that a number of commodities³ are within the exemption. Several trucking associations, and some sixty southern and western railroad companies, have intervened. These intervenors take a contrary view, and support the report of the Interstate Commerce Commission.

We are of the opinion that the action may not be maintained, and must be dismissed, for the reason that the report and order of the Interstate Commerce Commission of April 13, 1951, is not an "order" subject to judicial re-

-
3. "(1) Slaughtered meat animals and fresh meats;
 - (2) Dressed and cut-up poultry, fresh or frozen;
 - (3) Feathers;
 - (4) Raw shelled peanuts and raw shelled nuts;
 - (5) Hay chopped up fine;
 - (6) Cotton linters and cottonseed hulls;
 - (7) Frozen cream, frozen skim milk, and frozen milk;
 - (8) Seeds which have been deawned, sacrificed, or innoculated."

view under any of the statutes cited. The proceeding before the Commission was not an adversary one. The order which initiated it purported to do no more than direct that an investigation be made of the meaning of the statutory language. Notice was given only to the public. When the final report and order was forthcoming some two years later, the only "order" entered was one discontinuing the proceeding and removing it from the Commission's docket. The question is controlled by *U. S. v. Los Angeles R. R. Co.* (273 U. S. 284), holding a very similar "order" of the Interstate Commerce Commission which found, after an investigation, the value of certain railroad properties, not to be subject to review. The language of Mr. Justice Brandeis, speaking for a unanimous Court there, aptly describes the order in issue here:

"The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation."

The proponents of jurisdiction here rely upon *Columbia Broadcasting System v. U. S.* (316 U. S. 407). It was there held that an order of the Federal Communications Commission promulgating certain rules and regulations requiring that the Commission deny a license to broadcasting stations under certain circumstances, was subject to judicial review, upon a showing by the complaining party of strong equitable considerations. This authority is clearly

distinguishable from the present case. The order there in question was entered in the exercise of the agency's rule-making power. Such orders, together with those fixing rates and those determining controversies before the administrative body, have long been recognized as subject to review (*U. S. v. Los Angeles R. R. Co.*, supra).

Likewise, the complaining party there showed an immediate and continuing threat of irreparable injury if the order were not reviewed. It is not so here. The statement of plaintiff that it desires to carry for hire most or all of the commodities on the Commission's proscribed list, and that if it does so, the Commission likely will seek injunctive relief to restrain plaintiff, shows no basis for the intervention of a court of equity. Plaintiff will have an adequate remedy in the event of such interference.

It follows that Civil Action 8285 will be dismissed.
Civil Action 8396:

A complaint was filed December 23, 1953, with the Interstate Commerce Commission by East Texas Motor Freight Lines, Gillette Motor Transport, Inc., and Jones Truck Lines, Inc., charging that Frozen Food Express was and had been engaged in transporting fresh and frozen dressed poultry, and fresh and frozen meats, and meat products, for hire, between points in interstate commerce not authorized by its certificate of convenience and necessity. Frozen Food readily admitted that it had been so engaged, but defended on the theory that such products all were within the agricultural exemption. The Commission found each of these products not to be within the exemption, and ordered Frozen Food Express to cease and desist from such unauthorized transportation. The present proceeding was filed by Frozen Food Express to review that order.⁵

While the present action was pending in this Court, the Secretary of Agriculture of the United States filed with

5. Plaintiff has abandoned the contention that meat products are within the agricultural exemption, and this commodity will not be further considered here.

the Commission his petition for leave to intervene, pursuant to Sec. 1291, of Title 7, U. S. C. A. This request was denied; and the Secretary appears here as "Intervening Plaintiff", contending (1) that the proceedings before the Commission were null and void by reason of the failure of the Commission to notify him of the pendency thereof (Sec. 1291(a), of Title 7, U. S. C. A.); (2) that the proceedings should be remanded to the Commission by reason of its error of law in having denied him leave to intervene; and (3) that the cease and desist order should be enjoined by reason of the alleged error of the Commission in holding fresh and frozen meats, and fresh and frozen dressed poultry, to be beyond the limits of the agricultural exemption.

The rail carriers and trucking associations which intervened in Civil Action 8285, also appear in this action. They support the Commission, and oppose the position taken by the plaintiff and the Secretary of Agriculture.

Armour & Company, being engaged at various points in the United States in the slaughter of livestock and the killing, dressing, and sale of poultry, has intervened, urging that dressed poultry is an exempt commodity, that meat is not.

The position taken by the Secretary of Agriculture that the proceeding before the Commission was null and void in its entirety by reason of the failure of the Commission to give him notice thereof, need not long detain us. The proceeding there was not one with respect to "rates, charges, tariffs, and practices" relating to the transportation of farm products, and hence was not one of which the Secretary was entitled to notice under the statute (Secs. 1291 and 1622, of Title 7, U. S. C. A.): *U. S. v. Pa. R. R. Co.* (242 U. S. 208); *B. & O. R. R. Co. v. U. S.* (277 U. S. 292); *Mo. Pac. R. R. Co. v. Norwood* (283 U. S. 249). The Commission likewise did not commit an error of law in denying the Secretary's Petition of Intervention, filed there while the present proceeding was pending here.

Most able and exhaustive treatment is given the question now before us, in so far as it concerns dressed poultry, by Judge Gavin of the United States District Court for the Northern District of Iowa, in *L. C. C. v. Kroblin* (113 F. Supp. 599, aff. 212 F. 2d 555, cert. den. Oct. 14, 1954). Reviewing the long struggle between the Interstate Commerce Commission in its efforts to restrict the application of the exemption in question, and the Department of Agriculture and others in seeking to expand it; reviewing the legislative history of the Motor Carrier Act of 1935, and various proposed amendments thereto; and considering the congressional intent which prompted the insertion of the agricultural exemption, Judge Gavin concluded that dressed poultry constituted an "agricultural commodity", and did not constitute a "manufactured product thereof". Hence, such commodity was within the exemption. It is sufficient to state that we agree with those conclusions as to fresh and frozen dressed poultry.

Counsel for the Commission urges that this Court should disregard the *Kroblin* case, on the argument that the only question before us is one of the adequacy of the evidence before the Commission. It is said that the order which was entered was one within the general purview of the Commission's authority, and that if its findings are supported by "substantial evidence", this Court has no alternative but to leave it undisturbed. While we do not quarrel with such statement as a general proposition of law, the argument is not convincing in its application to the present record. The primary facts before the Commission were without dispute and were the subject of stipulation. Reduced to simplest form, they showed that before a chicken or duck became "dressed poultry", the bird was killed, his feathers and entrails removed, he was chilled, and in some cases frozen, packaged, etc. In addition, such "facts" consisted of evidence of so-called "expert" nature, that this treatment or processing of the chicken or duck rendered him a "manufactured product".

It is apparent that there is only one ultimate finding called for, namely, whether under the type of processing reflected by the record, the product falls within the statutory definition. The question then is a mixed one of law and fact, calling for the application of the processes of legal reasoning and of principles of statutory construction. The fact that the Commission's findings are supported by an "expert" who gives his opinion that a dressed chicken is a manufactured product, does not foreclose the question, nor remove it from the scope of judicial review. *Baumgartner v. U. S.* (322 U. S. 665); *Lehmann v. Acheson* (206 F. 2d 592, 3C); *Galena Oaks Corp. v. Schofield* (— F. 2d —, 5C; Dec. 29, 1954, as yet unreported).

In our opinion, fresh and frozen meat does not fall within the category either of "ordinary livestock" or of "agricultural commodities", and hence is not within the exemption. Since the enactment of Part II of the Interstate Commerce Act in 1935, motor vehicles used exclusively in carrying "livestock, fish (including shell fish), or agricultural commodities (not including manufactured products thereof)", have been exempt. By amendment in 1940, the term "ordinary" was inserted immediately before the word "livestock". The term "ordinary livestock" is defined in Sec. 20(11) of the Act as "all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses".

Referring only to the live animals, "ordinary livestock" may not be tortured to include the carcasses of slaughtered meat animals, or the meat which is the product of butchering. Meat has been regarded generally in the industry as a controlled commodity for some twenty years. Congress has dealt with the agricultural exemption on many occasions. Considering the ease with which the Congress might have added appropriate language to evidence its intent to exempt fresh or frozen meat from Interstate Commerce Commission control, if it so desired, the absence of such language indicates that no such intent was entertained.

Nor may meat, fresh or frozen, be considered an "agricultural commodity" for present purposes. The exemption has treated the live meat animal in a separate generic class from "agricultural commodity" since the enactment of the statute; and if the live animal, on entering the slaughter pen or the packing house, is not an "agricultural commodity", we are unable to see how he becomes one on emerging therefrom in the form of beef or pork. The Commission was correct, in our opinion, in holding fresh and frozen meat to be non-exempt.

The enforcement of the order of the Interstate Commerce Commission, MC-C-1605, *East Texas Motor Freight Lines, Inc., et al. v. Frozen Food Express*, is enjoined and restrained in so far as said order interfered with, enjoins or restrains the plaintiff *Frozen Food Express* from transporting fresh and frozen dressed poultry in interstate commerce (when the motor vehicles used in carrying such poultry are not used for carrying any other property or passengers for compensation). Other relief sought by plaintiff is denied.

Clerk will notify counsel.

Done at Houston, Texas, this 26th day of January, 1955.

JOSEPH C. HUTCHESON JR.

Chief Judge, Fifth Circuit

BEN C. CONNOLLY

United States District Judge

J. M. KENNERLY

United States District Judge

*Concurring in Part and Dissenting
in Part*

TRUE COPY I CERTIFY

ATTEST:

V. BAILEY THOMAS, *Clerk*

By EDWARD A. BLYTHE,

Deputy Clerk

KENNERLY, *District Judge*:

Concurring in part and dissenting in part.

I concur with all the foregoing opinion except the decision in Civil Action 8396 with respect to fresh meat and frozen meat. As to that I respectfully dissent.

I think all of Section 303(b) should be given a broad and liberal construction, and that Section 303(b)(6) should be construed as including fresh meat and frozen meat. I think we should not only follow the reasoning of both the District Court and Court of Appeals in the Kroblin case with respect to dressed poultry and frozen dressed poultry, but that what is said is also applicable to fresh meats and frozen meats.

J. M. KENNERLY, *Judge*

Filed 26 day of Jan., 1955.

V. BAILEY THOMAS, *Clerk*

By RUBY MILLER, *Deputy*

TRUE COPY I CERTIFY

ATTEST:

V. BAILEY THOMAS, *Clerk*

By EDWARD A. BLYTHE,

Deputy Clerk

APPENDIX "B-2"

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 8285

FROZEN FOOD EXPRESS, ET AL.,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, ET AL.,
Defendants.

Judgment

This action, to enjoin and set aside an order of the Interstate Commerce Commission, having come on for final hearing on November 16, 1954, before a duly constituted three-judge District Court, convened pursuant to Sections 2284 and 2321-2325, Title 28, United States Code, consisting of the undersigned judges; and the Court having considered the pleadings and evidence, and the briefs and arguments of counsel for the respective parties, and being fully advised in the premises; and having on January 26, 1955, filed herein its opinion, holding that the order sought by the plaintiffs to be set aside and enjoined is not an order subject to judicial review under any of the said statutes; now, in accordance with the said opinion, it is hereby

ORDERED, ADJUDGED, AND DECREED that the relief prayed for by the plaintiffs, including the Secretary of Agriculture

as an intervening plaintiff, be, and the same hereby is, denied, and their complaints be, and the same hereby are, dismissed.

This the 23rd day of February, 1955.

/s/ JOSEPH C. HUTCHESON, JR.,
Chief Judge, United States Court
of Appeals for the Fifth Circuit.

/s/ THOMAS M. KENNERLY,
United States District Judge.

/s/ BEN C. CONNALLY,
United States District Judge.

IN THE
Supreme Court of the United States

October Term, 1955

No. 158
FROZEN FOOD EXPRESS,

Appellant

**UNITED STATES AND INTERSTATE COMMERCE
COMMISSION**

No. 159
INTERSTATE COMMERCE COMMISSION,

Appellant

FROZEN FOOD EXPRESS, et al.

No. 160
AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,

Appellants

FROZEN FOOD EXPRESS, et al.

No. 161
**AKRON, CANTON AND YOUNGSTOWN RAILROAD COMPANY,
et al.,**

Appellants

FROZEN FOOD EXPRESS, et al.

No. 162
EAST TEXAS MOTOR FREIGHT LINES, INC., et al.,

Appellants

**FROZEN FOOD EXPRESS, SECRETARY OF AGRICULTURE
OF THE UNITED STATES, et al.**

No. 163
INTERSTATE COMMERCE COMMISSION,

Appellant

FROZEN FOOD EXPRESS, et al.

No. 164
**AKRON, CANTON AND YOUNGSTOWN RAILROAD COMPANY,
et al.,**

Appellants

FROZEN FOOD EXPRESS, et al.

BRIEF OF THE APPELLANT RAILROADS

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1955

No. 158

FROZEN FOOD EXPRESS,

Appellant,

v.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION

No. 159

INTERSTATE COMMERCE COMMISSION,

Appellant,

v.

FROZEN FOOD EXPRESS, ET AL.

No. 160

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,

Appellants,

v.

FROZEN FOOD EXPRESS, ET AL.

No. 161

AKRON, CANTON AND YOUNGSTOWN RAILROAD COMPANY, ET AL.,

Appellants,

v.

FROZEN FOOD EXPRESS, ET AL.

The Case Below

No. 162

EAST TEXAS MOTOR FREIGHT LINES, INC., ET AL.,
Appellants,

v.

FROZEN FOOD EXPRESS, SECRETARY OF AGRICULTURE OF
 THE UNITED STATES, ET AL.

No. 163

INTERSTATE COMMERCE COMMISSION,
Appellant,

v.

FROZEN FOOD EXPRESS, ET AL.

No. 164

AKRON, CANTON AND YOUNGSTOWN RAILROAD COMPANY, ET AL.,
Appellants,

v.

FROZEN FOOD EXPRESS, ET AL.

BRIEF OF THE APPELLANT RAILROADS**I****THE CASE BELOW**

The case below from which these appeals have been taken is *Frozen Food Express v. United States*, 128 F. Supp. 374 (S. D. Tex. 1955). This case involved two companion civil actions, namely Civil Action No. 8285 and Civil Action No. 8396. These actions were argued together and reported in a single opinion. The Court below consisted of the Honorable Joseph C. Hutcheson, Jr., Chief Circuit

Judge; the Honorable Ben C. Connally, District Judge; and the Honorable J. W. Kennerly, District Judge, concurring in part and dissenting in part. For the convenience of this Court a copy of the opinion is included in the record at pages 104 to 113 inclusive (Nos. 158-161).

II

THE JURISDICTION OF THE SUPREME COURT

The proceedings below were instituted to enjoin and set aside certain orders of the Interstate Commerce Commission, hereinafter sometimes referred to as the "Commission", issued respectively in *Determination of Exempted Agricultural Commodities*, I. C. C. Docket No. MC-C-968, 52 M. C. C. 511 (1951), hereinafter sometimes referred to as the *Determination* case, and *East Texas Motor Freight Lines Inc. v. Frozen Food Express*, I. C. C. Docket No. MC-C-1605, 62 M. C. C. 646 (1954), hereinafter sometimes referred to as the *Enforcement* case. Such proceedings below were instituted pursuant to the requirements of 5 U. S. C. § 1009, 28 U. S. C. §§ 1336, 1398, 2321-2325 and 49 U. S. C. § 305(g). The causes were heard by the three-judge Court below in accordance with the requirements of 28 U. S. C. § 2325.

The Court below held in Civil Action No. 8285 that the rulings of the Commission in the *Determination* case did not constitute an order subject to judicial review and denied relief to the plaintiff and the intervening plaintiff by dismissing their complaints in a judgment entered on February 23, 1955.

Notices of Appeal from this judgment were filed on or about April 19, 1955 by Frozen Food Express (No. 158), the Interstate Commerce Commission (No. 159), American Trucking Associations, Inc. (No. 160), and by these Appellant Railroads (No. 161). Jurisdictional statements were filed on or about June 17, 1955 by all of these several appellants.

The jurisdiction to review the judgment of the three-judge Court below is by statute. 28 U. S. C. §§ 1253 and 2101(b). The jurisdiction of this Court to review the judgment of the Court below by a direct appeal is also supported by numerous cases such as *United States v. B. & O. R. Co.*, 333 U. S. 169 (1948) and *I. C. C. v. Hoboken R. Co.*, 320 U. S. 368 (1943). That the rulings of the Commission in the *Determination* case are reviewable by this Court is established by *Columbia Broadcasting System v. United States*, 316 U. S. 407 (1942), and *American Trucking Associations Inc. v. United States*, 344 U. S. 298 (1953), and by the fact that they constitute an exercise of the Commission's rule-making powers within the meaning of sections 2(c)2 and 10(c) of The Administrative Procedure Act, 5 U. S. C. §§ 1001(c), 1009(c). Furthermore, these Appellant Railroads are not precluded from seeking review in this Court by any contention that the action of the Court below in dismissing the complaint was a favorable decision. Rather, the decision of the Court below which denies the Railroads the relief sought, namely a review on the merits of the Commission's rulings was, under the doctrine of a long line of cases beginning with *Corning v. Troy Iron and Nail Factory*, 56 U. S. 451 (1853), an unfavorable decision from which an appeal to this Court is proper.

The Court below in the companion case, Civil Action 8396, enjoined and restrained the Commission from enforcing its order in *East Texas Motor Freight Lines Inc. v. Frozen Food Express*, Docket MC-C-1605, 62 M. C. C. 646 (1954), insofar as the order of the Commission interferes with or restrains the transportation by Frozen Food Express of fresh or frozen dressed poultry without a certificate or permit duly issued pursuant to section 207(a) or section 209(b) of the Interstate Commerce Act (49 U. S. C. §§ 307(a), 309(b)). In so doing the Court below was enjoining and restraining the Commission from enforcing its ruling made in the *Determination* case respecting the status of fresh or frozen dressed poultry.

Notices of appeal from this decision of the Court below were filed on or about April 19, 1955 by East Texas Motor Freight Lines Inc. (No. 162), the Interstate Commerce Commission (No. 163), and by these Appellant Railroads (No. 164).

Jurisdiction of this Court to review this decision of the three judge Court below is established by statute. 28 U. S. C. §§ 1253 and 2101(b) and by such cases as *United States v. B. & O. R. Co.*, *supra*, and *Interstate Commerce Commission v. Hoboken R. Co.*, *supra*.

The time for filing motions to affirm was extended until August 16, 1955 by an order of this Court signed by Mr. Justice Black and, within the time so extended, the United States of America and the Honorable Ezra Taft Benson, Secretary of Agriculture, moved that the judgment of the Court below in Civil Action 8396 be affirmed. Briefs in opposition to this motion were filed on behalf of American Trucking Associations Inc., the Interstate Commerce Commission and these Appellant Railroads.

On October 10, 1955 this Court entered an order noting probable jurisdiction in all of the several appeals, Nos. 158 to 164 inclusive, October Term, 1955 and consolidated the appeals for oral argument.

III

THE STATUTES AND INTERSTATE COMMERCE COMMISSION ACTIONS INVOLVED

The statute primarily involved in the matters before this Court is section 203(b)(6) of the Interstate Commerce Act (49 U. S. C. § 303(b)(6)) which reads as follows:

“(b) Nothing in this Chapter, [i.e. referring to the economic regulatory powers of the Act governing the operations of motor common and contract carriers including such things as certificates, rates, etc.] . . . shall be construed to include . . . (6) motor vehicles used in carrying property consisting of . . . agricul-

tural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property . . . for compensation."

This section of the Act is commonly referred to as the "agricultural exemption" and will be referred to as such in this brief. To a perhaps somewhat lesser extent, sections 2(c), 4 and 10 of the Administrative Procedure Act (5 U. S. C. §§ 1001(c), 1003 and 1009) are also involved. It is not deemed necessary at this point to quote such sections, but, for the convenience of the Court, they are set forth in full in Appendix A attached hereto.

Involved in, and indeed the basis of, this litigation is the report and order of the Commission in *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511 (1951), and the report and order of the Commission in *East Texas Motor Freight Lines, Inc. v. Frozen Food Express*, 62 M. C. C. 646 (1954). The report and order in the *Determination* case is found at pages 30-102 of the printed record in Nos. 158-161 and the report and order in the *Enforcement* case is found at pages 6-16 of the printed record in Nos. 162-164.

IV

THE QUESTIONS PRESENTED FOR REVIEW

1. Did the Court below err in holding that the Report and Order of the Interstate Commerce Commission in *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511 (1951), was not subject to judicial review, when in that proceeding the Commission, after extensive hearings and the most mature and careful consideration in an effort to end confusion existing in the transportation industry and at the same time to bring about orderly regulation for the future, determined which of several commodities could be transported within the exemption of section

203(b)(6) of the Interstate Commerce Act, and which commodities could be transported only in compliance with the regulatory provisions of the Act?

In this Brief the affirmative of this question is argued.

2. Did the Court below err in enjoining and restraining the Interstate Commerce Commission from enforcing its order prohibiting a motor carrier from transporting fresh or frozen dressed poultry without authority from the Commission on the grounds that such poultry is within the exemption of section 203(b)(6) of the Interstate Commerce Act.

In this Brief the affirmative of this question also is argued.

V

THE STATEMENT OF THE CASE

A. The Background That Led to the Institution of the Determination Case Before the Commission

It is the view of these Appellant Railroads that this Court has before it the reviewability of Interstate Commerce Commission formalized action which in every sense constitutes an exercise of its "rule-making" power as that term is used in the Administrative Procedure Act. In addition, this Court is being asked to review on the merits an attempt by the Commission to enforce certain of the rules formulated in the *Determination* case and attacked in the *Enforcement* case.

To understand properly the nature of the Commission's action, and to appraise and evaluate the soundness and legality of the Commission's determinations, it is necessary to have in mind the circumstances which prompted the Commission to act in the way that it did. A brief sketch of the background that preceded this litigation will provide a suitable climate for judging the legal aspects and consequences of the Commission's activity and will, it is believed, simplify and clarify the issues.

At the time the Committees of Congress had under consideration the regulation of the interstate motor carriers, the nation was in the throes of a most severe economic depression which had visited an extremely serious financial crisis upon all forms of for-hire transportation both of the regulated variety, which at that time included only the railroads, and the unregulated, which included, among other forms of transportation, the interstate truckers. A vast over-supply of transportation facilities and a corresponding under-supply of freight traffic had created unsound economic conditions for the carriers and was threatening their continued ability adequately to move the nation's commerce. The ease with which new motor carriers could enter the field was worsening an already bad situation.

In an attempt to cope with the rapidly growing over-supply of transportation, Congress passed the Motor Carrier Act of 1935 (49 Stat. 543) which became Part II of the Interstate Commerce Act. The keystone in this Act are the provisions of sections 207(a) and 209(b) which confer upon the Commission the power to control the supply of motor carrier transportation by limiting the entry of new carriers into the field.¹ While it was intended that the Commission should have a plenitude of power over all types of interstate for-hire motor transportation, it was recognized that there were many such operations which, although in interstate commerce from a legal standpoint were, from a practical viewpoint, essentially of a local nature. To avoid excessively burdening the Commission and to avoid the impact on certain types of carriers of federal regulation aimed at transportation agencies that were truly competitive with the long haul operations of existing carriers, Congress included section 203(b) in the Act. This section exempts from the economic regulatory powers of the Commission specific types of interstate motor carrier operations. A

1. See Hearings on H. R. 5262, 74th Cong., 1st Sess., p. 27. Hearings on S. 1629, 74th Cong., 1st Sess., pp. 51, 78.

glance at this section indicates the type of operations that are exempted. For example, they include taxi service, school buses, vehicles operated by country hotels to bring passengers from depots, vehicles operated in national parks, vehicles used in distributing newspapers, and vehicles operating within municipalities. And, from the standpoint of this case, most important of all, vehicles used in transporting "agricultural commodities (not including manufactured products thereof)".

It is evident from the very language of the agricultural exemption that it would be necessary to make judgment determinations to ascertain whether particular commodities that have a farm origin, but which have been subjected to some processing, remain "agricultural products" and, therefore, can be transported outside of regulation, or have become "manufactured products thereof" which can only be transported by carriers that have certificates or permits from the Commission. Further, it is evident that with respect to a vast number of farm-origin commodities that have received some processing, the determination of whether they are exempt or non-exempt would be a difficult one to make because nowhere in the statute did Congress see fit to set forth the criteria to be applied in allocating a particular commodity into the exempt, or non-exempt, classification. This being so, it is apparent that Congress intended that the Commission to which it, over the years has given extensive powers to regulate the nation's surface transportation agencies, should, on the basis of the overall objectives of the Interstate Commerce Act, implement the general language of the exemption by pronouncements of policies which would give such language detailed meaning. Stated a little differently, it is evident from the language of the exemption that Congress intended that the Commission should supplement the broad language of the exemption by a detailed formula which would give it everyday workability. The legislative history bears this out. 79 Cong. Rec. 12205, 12207.

While it seems clear and beyond dispute that Congress intended the Commission should have wide latitude and broad powers to determine whether specific items were included in the exempt category of agricultural products or were to fall in the non-exempt category of manufactured products thereof, the task of making the allocation was not one easy of accomplishment.

With the tremendous technological development of long-haul highway transportation in the late thirties and early forties, the movement of farm origin commodities both of the processed and non-processed types over great distances by for-hire motor carriers greatly increased and, with this situation, problems arose which were of important concern to the entire transportation industry.

Numerous for-hire carriers either unable to meet the requirements for certificates of convenience and necessity, or desirous of doing a non-regulated business claimed that the hauling of processed agricultural products was covered by the agricultural exemption. Other carriers, acting on advice of the Commission's Bureau of Motor Carriers, sought and acquired certificates covering transportation activities which others were carrying on outside of regulation under the assumed protection of the agricultural exemption. Attempts by the Commission and those in the Commission's Bureau to determine on a piecemeal basis whether a particular commodity that originated on the farm, but which had been subjected to processing that to some degree changed its characteristics, was covered by the agricultural exemption, only added to the uncertainty and confusion that existed among those in the transportation industry. See the report of the Commission in the *Determination* case, *supra*, and the opinion of the lower Court in *I. C. C. v. Allen E. Kroblin, Inc.*, 113 F. Supp. 599 (N. D. Iowa 1953), *aff'd* 212 F. 2d 555 (8th Cir. 1954), *cert. denied*, 348 U. S. 836 (1955).

After World War II was over and conditions had returned to the relative normalcy of peace, the Commission, in

the later part of 1949, responded to petitions of the Department of Agriculture and to numerous requests for rulings interpreting the agricultural exemption by instituting a formal, broad, sweeping investigation for the purpose of determining the status of a vast number of processed commodities that originated in the agricultural community. This proceeding, as indicated before, was docketed as *Determination of Exempted Agricultural Commodities*, Docket MC-C 968, 52 M. C. C. 511 (1951).

B. The Determination Case Before the Commission

The *Determination* case is characterized by the Commission as an "investigation instituted on our own motion into and concerning the meaning of the 'term Agricultural Commodities (not including manufactured products thereof)' as used in section 203(b)(6) of the Act." The institution of this investigation was well known throughout the transportation industry both by the Commission's usual notices to the public and the press, by publication in the Federal Register (R. 29, Nos. 158-161) and by publicity given to this proceeding in trade journals and by the many transportation associations to their individual members. Hearing was held before one of the Commission's examiners at which all interested parties were given an opportunity to be heard. Many interested groups utilized this opportunity to present their views as to how the agricultural exemption should be interpreted and as to what commodities should be in the exempt or the non-exempt groups. Thereafter the Examiner issued a recommended report to which exceptions were taken by some parties. Other parties supported the Examiner's recommendations by replying to the exceptions. The Commission heard oral arguments and, on April 13, 1951, issued a report and order which these Appellant Railroads believe constitutes a completely lawful and entirely proper exercise of the Commission's power to prescribe and make effective interpretative rules.

Briefly, in the report and order, the Commission first defined the term "Agricultural Commodities" (R. 41, Nos. 158-161), and followed this with a definition of the term "Manufactured Products Thereof" (R. 44, Nos. 158-161). Having decided how the broad terms used by Congress should be defined, the Commission then went on and classified a long list of commodities as being either exempt or non-exempt (R. 89, Nos. 158-161). Since the Commission had made final determinations and had decided that further hearings were not necessary, although there had been requests for such further hearings, it was appropriate for the Commission to bring the investigation to a close. This was done in the usual manner by discontinuing the proceedings (R. 90, Nos. 158-161). That the Commission's proceedings in the *Determination* case constituted an exercise of the Commission's rule-making powers as such terms are used in the Administrative Procedure Act, and that the Commission's order as formulated had all of the finality and future effectiveness that was within the Commission's power to give to it, is, these Appellant Railroads believe, made evident by the Commission's report itself and by the litigation that followed the *Determination* case. It is significant to note at this point that no party in the instant litigation has complained, or is now complaining, that the proceedings before the Commission from a procedural standpoint were inadequate, unfair, or unlawful. In view of the fact that the proceedings more than complied with the standards of the Administrative Procedure Act, it would be surprising indeed if such a contention had been made.

C. The Litigation Before the Commission Subsequent to the Determination Case

In an attempt to test the validity of the Commission's rules in the *Determination* case and to prevent a competitor from carrying on operations in violation of the

rules, East Texas Motor Freight Lines and other certificated motor carriers, on December 23, 1953, filed a complaint with the Commission asking it to order Frozen Food Express to cease and desist from hauling, without a certificate of convenience and necessity, fresh or frozen meat, meat products and dressed poultry, which the Commission in the *Determination* case had held were in the non-exempt category. This matter was docketed by the Commission as *East Texas Motor Freight Lines Inc. v. Frozen Food Express*, Docket MC-C-1605, and reported at 62 M. C. C. 646 (1954). In the proceedings before the Commission it was stipulated that Frozen Food Express was engaged in the hauling of such commodities without a certificate, whereupon the Commission, in an appropriate adjudication which is not complained of as being inadequate from the procedural standpoint, issued a cease and desist order based on the rulings made in the *Determination* case. It is this order (R. 15-16, Nos. 162-164) which provided the immediate basis for the litigation below. It is significant to note that other attempts have been made to make effective the Commission's rulings in the *Determination* case by subsequent litigation.²

D. The Litigation in the Court Below

Frozen Food Express, aggrieved by the Commission's cease and desist order which compelled it to refrain from operations it had conducted formerly, filed suit in the District Court of the United States for the Southern District of Texas, Houston Division, to enjoin the Commission from enforcing its order. The Secretary of Agriculture, The Honorable Ezra Taft Benson, intervened in support of Frozen Food Express, and the American Trucking Associations, Inc., several motor carriers, and these Appellant Railroads intervened in support of the Commission. The matter was docketed by the Court below as *Frozen Food Express v. United States*, Civil Action No. 8396.

2. *I. C. C. v. Allen E. Kroblin*, *supra*.

In a separate suit filed at about the same time Frozen Food Express asked the Court below to enjoin and restrain the Commission and the United States Government from enforcing or recognizing the validity of the Commission's order in the *Determination* case alleging, *inter alia*, that the Commission's action in that matter was arbitrary, unreasonable and capricious. The Secretary of Agriculture joined in this second suit to the extent that certain commodities were held not to be exempt in the *Determination* case. The United States intervened in general support of the Commission's order in the *Determination* case, but admitted that the Commission's rules respecting particular commodities were a mistaken interpretation of the agricultural exemption. These Appellant Railroads and interested motor carriers and associations of motor carriers intervened in support of the Commission. This matter, with the same caption as the companion case was docketed by the Court below as Civil Action No. 8285.

Briefs were filed by all interested parties below and the cases were argued orally together.

In an opinion handed down January 26, 1955, the Court below unanimously held that the *Determination* case was not reviewable because the proceeding was not an adversary one and "purported to do no more than direct that an investigation be made into the meaning of the statutory language. Notice was only given to the public." The Court below took the position that the holding of this Court in *United States v. Los Angeles R. Co.*, 273 U. S. 299 (1927) was authority for its ruling. The complaint seeking the review of the *Determination* case was, therefore, dismissed.

The Court below also unanimously held in Civil Action 8396 that the Commission should be enjoined from enforcing its order against Frozen Food Express insofar as fresh and frozen dressed poultry was concerned.³ Thus the Court

3. Judge Kennerly, in a separate opinion, also expressed the view that the Commission should be enjoined from enforcing its cease and desist order against Frozen Food Express insofar as fresh and frozen

below reviewed the *Enforcement* case but declined to review the *Determination* case, although the two cases involved the same provisions of the Interstate Commerce Act and the same questions of statutory construction, and further, the Commission's decision in the *Enforcement* case was based entirely upon the rules earlier formulated in the *Determination* case.

E. The Proceedings Before This Court

The actions in the Court below which grew out of the litigation before the Commission are before this Court in the several related appeals. This Court, as indicated before, has noted probable jurisdiction by an order dated October 10, 1955. In summary, there are two principal questions presented:

1. Whether the Commission's order in the *Determination* case is reviewable; and

2. Whether the Court below erred in holding that the Commission had improperly attempted to enforce its ruling made in the *Determination* case to the effect that fresh or frozen dressed poultry are not agricultural commodities as that term is used in section 203(b)(6) of the Interstate Commerce Act, by issuing the cease and desist order against Frozen Food Express.

While these questions are the cardinal ones and extremely important, still another question arises should this Court find—as these Appellant Railroads contend that it should—that the order of the Commission in the *Determination* case is reviewable. That question is the extent to

meats were concerned. The majority of the Court was of the other view and held that the Commission's rules holding that fresh and frozen meats were non-exempt, were proper. This ruling of the Court below on fresh and frozen meat is not before this Court except as all of the Commission's rules in the *Determination* case may be held reviewable.

which this Court should announce principles governing any subsequent review of the *Determination* case on the merits.

F. Other Litigation Involved in the Instant Litigation Before This Court

The problem of interpreting the agricultural exemption has not been singular to the *Determination* case and the *Enforcement* case which are of direct concern in the litigation now before this Court. Rather, the problem of interpreting the agricultural exemption has been a matter of concern to several federal Courts and to the Commission in several cases both prior, and subsequent, to the *Determination* case. And, as pointed out by these Appellant Railroads in their initial pleadings before this Court, the results of the several court decisions involving this section of the Act have neither established a pattern of uniformity or a trend of decisions that is likely to result in the elimination of the confusion and uncertainty that has existed since the passage of the Motor Carrier Act of 1935. If anything, the decisions of the courts have tended to extend and widen the confusion that already exists.

A review of the cases indicates that the rulings of the Commission in the *Determination* case have been supported or confirmed by the decisions of the Courts in *I. C. C. v. Weldon*, 90 F. Supp. 873 (W. D. Tenn. 1950), aff'd, 188 F. 2d 367 (6th Cir. 1951), cert. denied, 342 U. S. 827 (1951); *Southwest Trading Company v. United States*, 208 F. 2d 708 (5th Cir. 1953) and by the Court below with respect to fresh and frozen meats. The Commission itself has followed its rulings in the *Determination* case, in *East Texas Motor Freight Lines v. Frozen Food Express*, 62 M. C. C. 646 (1954); *W. C. McClintock Common Carrier Application*, Docket MC-113629 (Sub No. 1) (I. C. C. November, 1954); *Alexander Kroblin Inc. Extension—Dairy Products*, Docket MC-70252 (Sub No. 5) (I. C. C. April, 1955); *Penn Dixie Lines, Inc. Extension—Rice*, Docket No. MC-110190

(Sub No. 19) (I. C. C. November 21, 1955) and *Marino Trucking Co., Inc.—Extension—Pet.* Docket No. MC-84805 (Sub No. 2) (I. C. C. December, 1955).

In other cases the Commission's rulings in the *Determination* case have been held improper by the Courts, *I. C. C. v. Yeary Transfer Co.*, 104 F. Supp. 245 (E. D. Ky. 1952) aff'd, 202 F. 2d 151 (6th Cir. 1953); *I. C. C. v. Allen E. Kroblin*, *supra*.

It is the belief of these Appellant Railroads that the instant litigation before this Court provides a most acceptable vehicle for a ruling by this Court that will either bring an end to the confusion that now exists, or provide a basis for future determinations by the Commission and the Courts that will promote clarity and certainty.

VI

SUMMARY OF ARGUMENT

The Court below erred in holding that the *Determination* case was not reviewable, for under the principles announced by this Court in such important cases as: *Assigned Car Cases*, 274 U. S. 564 (1927); *Morgan v. United States*, 298 U. S. 468 (1936); and *American Trucking Associations Inc. v. United States*, 344 U. S. 298 (1953), the Interstate Commerce Commission, in the *Determination* case was exercising its quasi-legislative function by filling in the details of section 203(b)(6) of the Interstate Commerce Act so that the broad language utilized by Congress would be given a readily understood meaning and everyday workability.

It is well established that where the Commission has exercised its quasi-legislative function, such action is reviewable on the merits by a federal three-judge statutory court. Section 10 of the Administrative Procedure Act; *American Trucking Associations, Inc. v. U. S.*, *supra*. See also, *Assigned Car Cases*, *supra* at 583; *Columbia Broadcasting System v. United States*, 316 U. S. 407, 417 (1942).

Reliance by the Court below upon *United States v. Los Angeles R. Co.*, 273 U. S. 299 (1927) as authority for its judgment that the Commission's rulings in the *Determination* case were not reviewable was improper, because the *Los Angeles R. case* did not involve quasi-legislative action of the Commission, but rather a Commission investigation into the value of a single rail carrier, the results of which were not formalized by an order requiring such carrier to either undertake or refrain from specified action.

Since the *Determination* case involved an exercise of the quasi-legislative function of the Commission, this Court should reverse the judgment of the Court below and order it to review the *Determination* case on the merits. In so doing, these Appellant Railroads most respectfully urge, that this Court announce principles of law to guide the Court below in making the review so that the uncertainty and confusion that exists in several federal court decisions respecting the interpretation of the agricultural exemption (Section 203(b)(6) of the Interstate Commerce Act) may be eliminated.

Specifically, these Appellant Railroads urge this Court to reaffirm the principles of statutory construction announced unequivocally by it in such cases as: *Piedmont & N. Ry. Co. v. I. C. C.*, 286 U. S. 299 (1932); *McDonald v. Thompson*, 305 U. S. 263 (1938); *Gregg Cartage Co. v. United States*, 316 U. S. 74 (1942); and *Crescent Express Lines v. United States*, 320 U. S. 401 (1943). In those cases this Court has declared that because of the great scope and complexities of the Interstate Commerce Act, which provides a comprehensive scheme for regulating all types of surface-for-hire interstate transportation, that all exemptions from regulation should be strictly or narrowly construed.

Because the agricultural exemption is contained in a long list of other exemptions from economic regulation; because Congress has nowhere indicated in the Act that the agricultural exemption should be given different inter-

pretation than other exemptions; and because the agricultural exemption, unless narrowly or strictly construed will frustrate the objectives of Congress in enacting the Motor Carrier Act; this Court should make it clear that the agricultural exemption, like all other exemptions in the Interstate Commerce Act should be strictly or narrowly construed.

These Appellant Railroads most respectfully submit that this Court should also reverse the judgment of the Court below which held—contrary to the ruling of the Interstate Commerce Commission—that the transportation of fresh or frozen dressed poultry was exempt from the economic regulatory powers of the Commission and that, therefore, the order of the Commission requiring Frozen Food Express Inc. to cease and desist from hauling such commodities in interstate commerce without a certificate or permit duly issued by the Commission should be enjoined and restrained. In effect, these Appellant Railroads are asking this Court to restore the order of the Commission requiring Frozen Food Express to cease and desist from hauling fresh or frozen dressed poultry in interstate commerce until the carrier secures a certificate or permit from the Commission. The basis for this position of the Appellant Railroads is that the Court below improperly held in reliance upon *I. C. C. v. Allen E. Kroblin*, 113 F. Supp. 599 (N. D. Iowa 1953) that the agricultural exemption should be liberally construed in favor of the exempt status whereas, as indicated before, this Court has made it clear that exemptions from regulation contained in the Interstate Commerce Act should be narrowly or strictly construed.

It is the position of these Appellant Railroads that had the Court below followed the pronouncements of this Court respecting the principles of statutory construction to be used in interpreting exemptions from regulation contained in the Interstate Commerce Act, that Court upon giving proper weight to the rulings of the Commission respecting

the status of fresh or frozen dressed poultry would have concluded that such commodities were not in the exempt category, but rather when transported in for-hire carriage must move in vehicles of carriers having certificates or permits issued by the Commission.

In summary, upon the bases of these contentions and the arguments more fully developed in the section of this Brief entitled "Argument", these Appellant Railroads most respectfully ask this Court to reverse the judgment of the Court below holding that the *Determination* case was not reviewable. Further, these Appellant Railroads most respectfully urge that the judgment of the Court below respecting the status of fresh or frozen dressed poultry should also be reversed.

VII ARGUMENT

A. The Court Below Erred in Holding That the Commission's Rulings in the Determination Case Were Not Subject to Judicial Review

1. THE ACTIONS BY THE COMMISSION IN THE DETERMINATION CASE CONSTITUTED AN EXERCISE OF THE COMMISSION'S QUASI-LEGISLATIVE FUNCTION

The Court below, in dismissing the complaint insofar as it asked the Court to review the *Determination* case (Civil Action 8285), said at page 7 (R. 108, Nos. 158-161):

"We are of the opinion that the action may not be maintained, and must be dismissed, for the reason that the report and order of the Interstate Commerce Commission of April 13, 1951, is not an 'order' subject to judicial review under any of the other statutes cited. The proceeding before the Commission was not an adversary one. The order which initiated it purported to do no more than direct that an investigation be made of the meaning of the statutory language. Notice was given only to the public. When the final report and order was forthcoming some two years later, the only 'order' entered was one discontinuing the proceeding and removing it from the Commission's docket."

The Court below then cited as authority for its holding that the order was not reviewable, *United States v. Los Angeles R. Co.*, 273 U.S. 299 (1927).

It is apparent that the Court below, in ruling as it did, failed adequately to distinguish between two principal functions of most of the federal administrative agencies. Had the investigation by the Commission been concerned with

the activities of a single carrier with the object in mind of issuing a cease and desist order against such carrier, the observations of the Court below might well have been applicable and the opinion of this Court in *United States v. Los Angeles R. Co.*, *supra*, probably controlling.

Under such circumstances the Commission would have been exercising its quasi-judicial function or, in the terms of the Administrative Procedure Act, making an adjudication. In proceedings where an administrative agency is attempting within its jurisdictional field to apply the law to a particular subject of regulation by compelling such subject either to do something which the law requires, or to refrain from doing something prohibited by law, the agency is engaging in a role which the courts traditionally have exercised. This being so, such proceedings must, by the established precedents and by the requirements of the Administrative Procedure Act, meet the standards of procedural due process of law. That is, there should be notice to the individual defendants, full adversary proceedings including the right to present testimony and to cross-examine witnesses, and a definitive order issued either for or against the defendant. Stated a little differently, the administrative proceedings partake of the essential nature of judicial proceedings and must provide the safeguards that are deemed all important in the American system of individual justice. See *e.g. Assigned Car Cases*, 274 U. S. 564, 583 (1927); *Pennsylvania Railroad Company v. New Jersey State Aviation Commission, et al.*, 2 N. J. 64, 65 A. 2d 61, 63 (1949); See also sections 5, 7 and 8 of the Administrative Procedure Act.

Where the administrative agency is dealing with a matter that permits of an adjudication, but for one reason or another, the agency either does not provide the requisite procedural safeguards, or does not finalize its findings by an order directing the defendant subject of regulation to either do something or refrain from doing something, the agency's action does not constitute an adjudication and is

not, therefore, reviewable on the merits. Were the agency to attempt to enforce its findings, the person affected thereby could appeal to the courts to restrain such an attempt because in legal contemplation the findings of the agency would be a nullity. Such findings would amount to nothing more than an administrative conclusion which the agency desired to make known to a business subject to its regulation as a possible guide to it in its everyday affairs. That is precisely what this Court held in *United States v. Los Angeles R. Co.*, 273 U. S. 299 (1927). There, the Commission conducted an investigation to fix the value of a single railroad. The results of this investigation, while made known in a Commission report, were not reduced to an order compelling the rail carrier to utilize the valuation in any particular manner. An attempt was made to review the Commission's findings. This Court in holding that review on the merits was improper in an opinion by Mr. Justice Brandeis said at Page 309:

"The so-called order here assailed differs essentially from all those held by this Court to be subject to judicial review under any of those Acts. Each of the orders so reviewed was an exercise either of the quasi-judicial function of determining controversies or of the delegated legislative function of rate making and rule making."

This Court then went on and pointed out that the so-called order was: (Pages 310-311)

"* * * the exercise solely of the function of investigation [and that it was] at least possible that no proceeding will ever be instituted, either before the Commission or a court, in which the matters now complained of will be involved or in which the errors alleged will be of legal significance."

If the Commission in the *Determination* case had had before it the question of the applicability of the agricultural

exemption to a single carrier's particular operation, the observations of the Court below respecting the procedures utilized, and its reliance upon the *Los Angeles Railroad* case might have been appropriate because the *Determination* case was not concluded by an order requiring any designated carrier to undertake, or refrain from, specified action. But the Commission was dealing with a vastly different situation in the *Determination* case, and it is this feature that makes the observations of the Court below completely inappropriate and the *Los Angeles Railroad* case non-controlling.

The function of administrative agencies is not limited to the making of adjudications. By the very nature of the broad economic areas in which they operate, it is necessary that the agencies be given power to fill in the details and implement the Congressional policies outlined in the basic legislation establishing the agencies. Particularly is this true in the case of the Interstate Commerce Commission to which Congress has entrusted the responsibility of overseeing and regulating the affairs of the nation's gigantic transportation system. In fact, this Court itself has recognized this function by saying, in reference to provisions of the Interstate Commerce Act:

“ . . . But all legislation dealing with this problem since the first Act in 1887, 24 Stat. 379, has contained broad language to indicate the scope of the law. The very complexities of the subject have necessarily caused Congress to cast its regulatory provisions in general terms. Congress has, in general, left the contents of these terms to be spelled out in particular cases by administrative and judicial action, and in the light of the Congressional purpose to foster an efficient and fair national transportation system.” *United States v. Pennsylvania R. Co.*, 323 U. S. 612, 616 (1945).

A component of this quasi-legislative function of implementing Acts of Congress is the administrative agencies'

rule making power⁴ which has, on numerous occasions, been upheld by this Court both as to agencies in general and the Commission in particular.⁵

Essentially, the quasi-legislative function of administrative agencies is a delegation of legislative power circumscribed by limitations which Congress establishes to prevent the agency from usurping or improperly exercising rights vested solely in the Congress by the Constitution. It is a limited power given by Congress in this instance to the Commission to prescribe standards of conduct to govern the future actions of a substantial portion of the carriers subject to regulation.

Where the quasi-legislative function is being exercised, it is apparent that the procedural standards to be met must of necessity differ considerably from those in adjudications. Since the rules to be prescribed by the agency will affect many persons, it follows that individual notice is not as appropriate as notice to the general public. Further, it appears that since the rules to be prescribed have general applicability the concern is not so much with the individual, but rather with the group. Adversary proceedings are poorly adapted to establish the requirements of a group. Finally, the rules governing future conduct, are not directed to any particular individual, but rather, like a statute, apply to no one in particular but to everyone in general. Having these basic thoughts in mind it cannot be gainsaid that if the Commission in the *Determination* case was in fact exercising its quasi-legislative function that the observation of the Court below respecting the Commission's procedures was wholly inappropriate because the type of proceedings utilized by the Commission were particularly well suited to the exercise of that function.

4. See the famous leading case: *Morgan v. United States*, 298 U. S. 468 (1936), 304 U. S. 1 (1937), 307 U. S. 183 (1939), 313 U. S. 409, (1941); and Sections 2(c) and 4 of the Administrative Procedure Act.

5. See e.g. *American Trucking Associations Inc. v. United States*, 344 U. S. 298 (1953).

The question thus resolves itself into a simple inquiry as to whether or not the Commission was exercising its quasi-legislative function or rule making power in the *Determination* case. Section 2(c) of the Administrative Procedure Act, defining rule making, states:

“ ‘Rule’ means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy * * * and includes the approval or prescription for the future of * * * services * * * or practices bearing upon any of the foregoing [i.e. including services]. ‘Rule making’ means agency process for the formulation, amendment, or repeal of a rule.”

From this section of the Administrative Procedure Act, it seems clear beyond all doubt that “rule making” includes the making of rules interpreting the statutory language under which the regulatory processes of the Commission are to be carried out. In the *Determination* case, the Commission was confronted with a situation where the language of the agricultural exemption was not self-explanatory and where, as explained by the Commission, there was considerable agitation for authoritative interpretation by the Commission that would eliminate confusion and doubt. So it can be said that the situation was one that called for the exercise of the rule making power.

The Commission, responsive to the situation, instituted and carried on the *Determination* case. It would be well to place the proceedings alongside the requirements of section 4 of the Administrative Procedure Act to see whether it constituted rule making.

Section 4 provides in Paragraph (a) that general notice of the proposed rule making be published in the Federal Register unless all interested persons have actual notice. It appears in this instance that notice was filed in the Federal Register, and that all interested persons had ac-

tual notice, either by reason of the publication of the Commission's order instituting the proceeding in various trade journals or through the innumerable carrier associations that regularly advise their members of matters of interest to them. The Court below states that notice to the general public was given and it is important to note in passing that no one has complained of the inadequacy of notice. Further, it appears that since the Commission was concerned with the interpretation of the statute that the provisions of section 4(a) of the Act were not strictly applicable.

After the institution of the proceeding, the procedure followed by the Commission conformed to, and from the standpoint of due process more than satisfied the requirements of Paragraphs (b), (c) and (d) of section 4 of the Administrative Procedure Act. Those paragraphs require merely that the agency (1) give all interested parties an opportunity to be heard either orally or in writing, (2) consider all of the relevant matters submitted, (3) prescribe the rules, accompanying such rules by the reason for their prescription, and (4) give interested parties an opportunity to petition for modification of the rules. The Commission not only gave every interested party the right to present his views, but also held full scale hearings which included an Examiner's recommended report, exceptions, oral argument before the Commission, and finally, a complete report and order of the Commission. Since the hearings more than satisfied the requirements of section 4, the report and order of the Commission itself, together with the situation to which the report was addressed, determines, in the final analysis, the nature of the Commission's action.

The report and order in the *Determination* case in every way points to the almost irrefutable conclusion that the Commission was engaged in rule making. First of all the Commission points out that the issue is to determine the meaning of the agricultural exemption (R. 38, Nos. 158-161), quite obviously for the future. The Commission then

describes the various interpretations possible and concludes that the term "agricultural commodities" embraces:

"All products raised or produced on farms by tillage and cultivation of the soil (such as vegetables, fruits, nuts), forest products, live poultry and bees; and commodities produced by ordinary live stock, live poultry and bees (such as milk, wool, eggs and honey)" (R. 41, Nos. 158-161).

Having interpreted the term "agricultural commodities" as used in section 203(b)(6), the Commission then turned to the interpretation of the words: "not including manufactured products thereof". With respect to these words the Commission said:

"* * * we conclude that the portion of the term '(not including manufactured products thereof)' means agricultural commodities in their natural state and those which, as a result of treatment or processing, have not acquired new forms, qualities, properties, or combinations." (R. 44, Nos. 158-161).

The Commission having made these interpretations of the language of the agricultural exemption, went further and, by application of these principles and tests, classified a large number of specific agricultural articles as being either exempt or non-exempt. Both the interpretations and the classifications made by the Commission were made the subject of specific findings (R. 89, Nos. 158-161).

It would seem that in this instance the Commission had done for Congress something which Congress itself could have done, namely filled in the details which give meaning and substance to section 203(b)(6).

Having made final determinations of future applicability, the Commission quite properly discontinued the investigation and brought the proceedings to an end.

If there is any doubt remaining that the Commission was prescribing rules governing future action of the carriers, the last vestige is removed by the Commission's subsequent action relying on these rules to determine and prevent violations of section 203(b)(6). This action included the Commission's cease and desist order against Frozen Food Express prohibiting it to haul, without certification, commodities in the non-exempt category, and the refusal to issue certificates to other carriers for the transportation of commodities in the exempt category. Every criterion that can be pointed to indicates that the Commission in the *Determination* case had prescribed interpretative rules and that, by its actions subsequent to the *Determination* case, attempted to make these rules effective.

But it might be contended by some that nowhere in the *Determination* case or elsewhere does the Commission say that it was engaging in rule making or prescribing interpretative rules and that, therefore, the arguments that the Commission was so engaged are not persuasive. The short answer to such contentions is that, in ascertaining the legal consequences that follow events, things are judged by what they are and not what they are said to be. See *Columbia Broadcasting System v. United States*, 316 U. S. 407, (1942) where Mr. Chief Justice Stone said at page 416, in holding that certain actions of the Federal Communications Commission constituted an exercise of its quasi-legislative function and, therefore, were reviewable although that commission had not formally so characterized its action:

"The particular label placed upon it [i.e. the Commission's action] is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive."

2. SINCE THE COMMISSION IN THE DETERMINATION CASE WAS ENGAGED IN RULE MAKING ITS ORDER CLASSIFYING SEVERAL COMMODITIES AS EITHER EXEMPT OR NON-EXEMPT IS SUBJECT TO JUDICIAL REVIEW

Once it is concluded that the Commission was engaged in rule making in the *Determination* case, it follows that the order prescribing the rules is subject to judicial review. The Administrative Procedure Act in section 10 establishes this. And were this not so, the cases decided by this Court would amply demonstrate that rule making by the Interstate Commerce Commission is subject to judicial review. *American Trucking Associations, Inc. v. United States*, 344 U. S. 298 (1953); *Assigned Car Cases*, 274 U. S. 564 (1927); and see *United States v. Los Angeles R. Co.*, 273 U. S. 299, 309 (1927). Perhaps of some significance is the fact that the rulings of the Commission in the *Determination* case have already been reviewed by another Federal District Court, *I. C. C. v. Allen E. Kroblin*, 113 F. Supp. 599, 616 (N. D. Iowa 1953).

A case that is particularly illuminating on the reviewability of administrative agencies' quasi-legislative actions is *Columbia Broadcasting System v. United States*, *supra*. There, this Court, in holding rule making of the Federal Communications Commission to be reviewable, referred to the established principle that rule making of the Interstate Commerce Commission had uniformly been held to be reviewable. At page 417 the Court said:

"Such regulations which affect or determine rights generally, even though not directed to any particular person or corporation, when lawfully promulgated by the Interstate Commerce Commission, have the force of law and are orders reviewable under the Urgent Deficiencies Act."

The bench marks in the field of administrative law, such cases as *Morgan v. United States*, *supra*, *Assigned*

Car Cases, supra, and recent important cases involving the reviewability of quasi-legislative orders of administrative agencies such as *American Trucking Associations, Inc. v. United States, supra*, and *Columbia Broadcasting System v. United States, supra*, make it clear that what the Commission did in the *Determination* case was to exercise its rule making power by interpreting the agricultural exemption and classifying a large group of commodities as either exempt or non-exempt. Such action by the Commission has been uniformly held to be subject to review by this Court. Where the Court below fell into mistake, these appellant Railroads most respectfully believe, was in applying standards applicable to adjudications to Commission action which was of an entirely different character. Had the action of the Commission been other than quasi-legislative, there might have been some basis for contending that a review on the merits would be improper. But where, as here, the action was quasi-legislative and the type of proceedings more than satisfied the standards of the Administrative Procedure Act, it follows that the Court below should have reviewed the *Determination* case on the merits.

B. The Appellants' Suggestions as to the Action This Court Should Take Upon Finding That the Commission's Rulings in the Determination Case Are Reviewable

Assuming that this Court concludes, contrary to the Court below, that the rulings of the Commission are reviewable, the question arises as to what this Court should do respecting the review on the merits. Examination of section 10 of the Administrative Procedure Act indicates that the scope of review insofar as the involved quasi-legislative action is concerned is limited to two inquiries. The first is whether the Commission's rulings are "arbitrary, capricious or an abuse of discretion" and the second is whether the rulings are "in excess of statutory jurisdiction, authority or limitations or short of statutory right". The

other of the six bases for Court review of the decisions of administrative agencies contained in section 10 are either applicable solely to adjudications, viz., paragraphs (5) and (6), or inapplicable because of the circumstances here involved, viz., (2) and (4), which present no constitutional question or, as explained before, no procedural short comings.

Quite obviously it is the function of the three judge Court below to review on the merits in the first instance actions of the Interstate Commerce Commission which are deemed by this Court to be reviewable, so it would appear that this Court could fulfill its judicial responsibilities by simply returning the matter to the Court below for review to determine whether the Commission's rulings are either arbitrary, capricious or an abuse of discretion, or in excess of statutory jurisdiction, authority, or limitation or short of statutory right.

But, as these Appellant Railroads have pointed out in their jurisdictional statement and in other pleadings filed in this litigation, such an order by this Court will not solve the vexing problems that have confronted the courts in interpreting the agricultural exemption. Moreover, it appears that such an order, standing alone, would stimulate and invite further litigation rather than eliminating litigation which in this situation is most important.

Without repeating at length the arguments already made, these Appellant Railroads believe that the source of the trouble in interpreting the agricultural exemption centers around the principles of statutory construction which are to be utilized. Briefly, the question is whether the words of section 203(b)(6) should be given a narrow interpretation, that is strictly construed against exemption; or a broad interpretation, extending to the utmost the exemption from regulation.

The Commission in the *Determination* case was undoubtedly influenced in classifying commodities as non-

exempt by the rule of statutory construction announced by this Court in such cases as *Piedmont & N. Ry. Co. v. I. C. C.*, 286 U. S. 299 (1932); *McDonald v. Thompson*, 305 U. S. 263 (1938); *Gregg Cartage Co. v. United States*, 316 U. S. 74 (1942); and *Crescent Express Lines v. United States*, 320 U. S. 401 (1943). That rule is to the effect that because of the great scope and complexity of the regulatory scheme of the Interstate Commerce Act, which is remedial legislation, and because of the expanding powers that have been vested in the Commission, all exemptions from regulation should be strictly construed to prevent the watering down and erosion of it. Where the courts have reached decisions both before and after the *Determination* case which are contrary to and opposed to the Commission's rulings, such decisions have been prompted by the belief that the agricultural exemption, unlike other exemptions contained in the Interstate Commerce Act, should be construed in favor of the exempt status. *I. C. C. v. Kroblin*, *supra*, and *I. C. C. v. Yeary*, *supra*. This is brought out by the language of the Court in the *Kroblin* case. There, in disapproving of the Commission's ruling respecting fresh dressed poultry, the Court said at page 630 (113 F. Supp. 596):

"The construction or interpretation of Section 203(b)(6) contended for by the Interstate Commerce Commission would be highly restrictive of the scope of Section 203(b)(6) so far as poultry is concerned."

Where the Commission's rulings respecting particular commodities have been sustained by the Courts, there has been approval of the Commission's strict construction of the exemption, e.g., *I. C. C. v. Weldon*, 90 F. Supp. 873 (W. D. Tenn. 1950), *aff'd* 188 F. 2d 367 (6th Cir. 1951), cert. denied, 342 U. S. 827 (1951); *Southwest Trading Company v. United States*, 208 F. 2d 708 (5th Cir. 1953).

The Court below, in enjoining the Commission's efforts to make effective its ruling made in the *Determination*

case respecting fresh or frozen dressed poultry, did so entirely upon the reasoning used by the Court in the *Kroblin* case. At Page 12 of its opinion (R. 57, Nos. 162-164) the Court below said:

"Most able and exhaustive treatment is given the question now before us, insofar as it concerns dressed poultry by Judge Gavin of the United States District Court for the Northern District of Iowa, in *I. C. C. v. Kroblin*, * * * it is sufficient to state that we agree with those conclusions as to fresh and frozen dressed poultry."

From this statement it is evident that the Court below is of the view that at least with respect to border line commodities their falling into the exempt or the non-exempt status depends almost entirely upon whether section 203(b)(6) is given a strict or narrow construction. And seemingly the Court below as of this time is of the view that the liberal construction of the agricultural exemption is proper.

The primary purpose of this litigation is to determine the proper construction of the agricultural exemption. This can be done, whether the judgments below be affirmed or reversed, if this Court will state the rules of statutory construction to be followed in construing the exemption. This the Court may properly do, for the Commission's order in the *Enforcement* case is unquestionably reviewable and a statement of the principles to be followed in construing the agricultural exemption would normally be included in an opinion in which the validity of such an order is in issue. Of course if the order in the *Determination* case is reviewable, as these Appellants respectfully insist, a statement of the principles to be followed in construing the exemption is essential for the guidance of the Court below.

If this Court should affirm or reverse the judgment below without stating the rules of statutory construction to be followed in construing the agricultural exemption,

the present litigation will have been largely in vain, and the lower courts, the Commission, and the transportation industry will still be in the dark as to the proper construction of the exemption. The confusion and uncertainty now existing will continue and will result in much needless and expensive litigation.

C. This Court in Holding the Determination Case Reviewable and in Reviewing the Holding of the Court Below Respecting Fresh or Frozen Dressed Poultry Should, These Appellants Submit, Make It Clear That the Agricultural Exemption Should Be Strictly or Narrowly Construed

As pointed out in the previous section of this argument, the Court below, in reversing the Commission's ruling respecting fresh or frozen dressed poultry, did so upon the reasoning of the Court in the *Kroblin* case. There, the Court held that the Commission narrowly construed the exemption whereas this particular exemption, as contrasted with others in the Act, should be broadly or liberally construed in favor of the exempt status. The Court below in following the *Kroblin* case, these Appellant Railroads believe, lost sight of the well established doctrine announced by this Court on several occasions to the effect that exemptions from regulation in the Interstate Commerce Act should be strictly construed.

The issue is thus squarely presented as to whether there is something about the agricultural exemption that distinguishes it from other exemptions in the Act, for otherwise it should be governed by the same rules of statutory construction.

It might be argued that the rule of strictly construing exemptions so clearly pronounced by this Court in the *Piedmont* case having been formulated prior to the passage of the Motor Carrier Act of 1935 (now Part II of the Interstate Commerce Act), has applicability only to exemptions contained in Part I of the Act. Not only has this

Court reaffirmed this principle of narrow construction in later cases dealing with Part II of the Interstate Commerce Act such as *McDonald v. Thompson*, 305 U. S. 263 (1938); *Gregg Cartage Co. v. United States*, 316 U. S. 74 (1942); and *Crescent Express Lines v. United States*, 320 U. S. 401 (1943), but it has taken pains to emphasize that the unity of purpose and necessary integration of the various parts of the Act call for uniform administration:

“The 1940 Transportation Act is divided into three parts, the first relating to railroads, the second to motor vehicles, and the third to water carriers. That Act, as had each previous amendment of the original 1887 Act, expanded the scope of regulation in this field and comparatively broadened the Commission's powers. The interrelationship of the three parts of the Act was made manifest by its declaration of a ‘national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each.’ The declared objective was that of ‘developing, coordinating, and preserving a national transportation system by water, highway, and rail, . . . adequate to meet the needs of the commerce of the United States’ Congress further admonished that ‘all of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.’” *United States v. Pennsylvania R. Co.*, 323 U. S. 612, 616-617 (1945).

This being so it would appear that, in the absence of very strong and compelling reasons for the application of a different principle respecting section 203(b)(6) of the Act, this section should be interpreted according to the pattern that applies elsewhere throughout the Act.

Examination of the section here involved in relation to other sections of the Act indicates that there is no basis for

distinguishing it. Rather, the indication is directly to the contrary and strongly supports the view that the standard principle of interpretation is called for.

The agricultural exemption is not set apart as something special or unique but is contained in a long list of exemptions each of which, if broadly construed, would tend to limit greatly the powers of the Commission and the areas in which the Commission is to operate. For example, in section 203(b)(7a), the transportation of persons or property when incidental to transportation by aircraft is exempt. A liberal construction of this exemption, in view of the constant expansion of air transport, would have the effect of nullifying almost entirely the Commission's regulatory powers over a considerable portion of the nation's interstate for-hire transportation over the highways. The same thing could be said of section 203 (b)(9) which exempts casual, occasional, or reciprocal transportation of passengers or property. A liberal interpretation of that section would make it impossible for the Commission to regulate all types of irregular motor carrier operations which today encompass one of the largest areas of the Commission's jurisdiction.

From the very position of the agricultural exemption in a long list of exemptions, it is evident that Congress did not intend that this particular exemption be given a different interpretation from the other exemptions in either section 203(b) or elsewhere in the Act. This, together with the fact that Congress has never seen fit to change the principles announced by this Court for interpreting any exemptions in the Act is convincing evidence that Congress did not intend that the agricultural exemption should be treated differently from the other exemptions throughout the Act.

When the over-all objectives of Congress in enacting the Motor Carrier Act of 1935 are considered, it can scarcely be believed that Congress intended that a liberal interpretation should be given to the agricultural exemption. At the

time of, and for several years prior to, the coming of regulation for interstate motor carriers, the situation was one where ease of entry into the field by anyone owning a motor truck had created great instability and wide spread discriminatory practices. These circumstances were not only jeopardizing the investments of the for-hire truckers, but were also endangering the nation's railroads, the only regulated type of interstate for-hire transportation at that time. Shippers were being affected by the spread of discriminatory practices that threatened existing rate structures, rate relationships and rate groupings. To correct this rapidly deteriorating state of affairs, Congress decided to bring the motor carriers under regulation similar in many ways to that under which the railroads were operating. The purposes of the Motor Carrier Act are best summarized perhaps by the late Commissioner Eastman. He said:

"The most important thing, I think, is the prevention of an oversupply of transportation; in other words, an oversupply which will sap and weaken the transportation system rather than strengthening it * * *. Another objective is to prevent wasteful and destructive competition, the sort of thing that has been referred to as 'rate wars' * * *. Another objective is to compel equal treatment of shippers and to prohibit unjust discrimination, compel adherence to published and known dependable rates * * *. Another purpose is to require adequate financial responsibility on the part of these carriers."

The foundation upon which the entire scheme of regulation contained in the Motor Carrier Act is built are the sections which require carriers to secure either a certificate or a permit from the Commission before engaging in for-

6. Hearings on Senate Bill 1629, Senate Committee on Interstate and Foreign Commerce 74th Congress, 1st Session; See also Regulation of Transportation Agencies, S. Doc. 152, 73rd Congress, 2d Sess., 14-15, 22-35, 226, 79 Cong. Rec. 12196, 12209.

hire operations. See *American Trucking Associations Inc. v. United States*, *supra*, at page 312.⁷ Where, however, for-hire interstate transportation is covered by the exemption in section 203(b), the Commission is totally without power to control the entry of new carriers into the field, to regulate rates, or to deal effectively with unsound competitive conditions. In areas where exemption exists the broad objectives of Congress cannot be implemented by the Commission. This, it seems to the Appellant Railroads, is the most compelling reason why the exemption contained in section 203(b)(6) must be strictly construed. This Court has already indicated that where the over all objectives of the Act are weighed against the benefits that might accrue to some segments of the nation's economy from the agricultural exemption, the over all objectives must prevail. In *American Trucking Associations Inc. v. United States*, *supra*, Mr. Justice Reed said at page 318:

"Needless to say, the statute is not designed to allow farm truckers to compete with authorized and certificated motor carriers in the carriage of non-agricultural products or manufactured products for off-the-farm use, merely because they have exemption when carrying only agricultural products. We can therefore find nothing in it which implies protection of agricultural truckers' right to haul other property, even though from an economic standpoint that right is important to protect profit margins. Regulated truckers must also receive protection upon their restricted routes and limited carriage. A balance between these competing factors, carried out in accordance with congressional purpose, does not seem to us unreasonable or invalid."

When it is considered that those supporting a broad interpretation of the agricultural exemption are advocating the complete absence of economic regulation for motor car-

7. See also 79 Cong. Rec. 12207-12211, 12222-12225.

riers which in most instances are exclusively engaged in for-hire carrier operations over long interstate distances in direct competition with both the certificated motor carriers and the railroads and which, except in rare instances, are completely divorced from the agricultural community so far as ownership is concerned, the necessity for strictly construing the agricultural exemption to prevent the erosion of the regulatory scheme becomes clear.

While the legislative history of the agricultural exemption is inconclusive in many respects, it does support the view that the exemption should be narrowly construed. A review of the legislative history discloses that the agricultural exemption was included in the Motor Carrier Act primarily for the benefit of farmers who either hauled their own or their neighbors produce to market and that it was not included to exempt from regulation for-hire carriers regularly engaged in the medium or long haul transportation of processed farm products from non-farm origins, such as processing plants, to the ultimate consumers. 70 Cong. Rec. 12213-12215.

The thinking of the Court in the *Kroblin* case, which the Court below adopted, has, as its basis, a concept which seems completely without merit. In the *Kroblin* case, after extensive review of the history of the agricultural exemption both prior and subsequent to the enactment of the Motor Carrier Act, the Court concluded that, because Congress had not enacted into law amendments that would have further narrowed the exemption, the courts should broadly construe the provisions of the exemption. No theory of logic or reasoning supports this view. The fact that Congress has not seen fit to further narrow the agricultural exemption, if it indicates anything at all, points to the conclusion that Congress believes that the use of the ordinary principle of strict construction results in sufficient tightness so that there is no need for making the exemption more restrictive. The failure of Congress to tighten the agricul-

tural exemption is therefore an affirmation of this Court's policy of strictly construing exemptions. If Congress were dissatisfied with the application of the principle of strict construction to the agricultural exemption it could have, on the several opportunities presented to it, amended section 203(b) to provide that Paragraph (6) should be liberally construed. But Congress has not done so.

In summary, there is no basis for concluding that section 203(b)(6) should, unlike all other exemptions from regulation, be given a broad or liberal construction. Rather, the legislative history, the position of this particular exemption in the statute, the over all objectives of the statute, and the applicable cases all strongly support the view that the agricultural exemption should be strictly or narrowly construed. This being so, it is most respectfully submitted that the Court below, in fashioning its holding involving fresh or frozen dressed poultry, did so upon an improper and unsound basis. If, therefore, this Court orders the Court below to review the *Determination* case, it should indicate to that Court that it should follow the principles announced by this Court in the *Piedmont* case, *supra*, and review the Commission's determinations in the light of a strict construction of the agricultural exemption.

D. This Court Should Find That the Ruling of the Court Below Respecting Fresh or Frozen Dressed Poultry Was in Error Both From the Standpoint of the Principles of Statutory Construction Utilized and in Result

The arguments respecting the applicable principles of statutory construction to be used in interpreting the agricultural exemption have been made, and the errors of the Court below respectfully referred to. All that remains is to show that the use of the proper principle would have brought about a different result. Stated a little differently:

If the Court below had, instead of following the *Kroblin* case, strictly construed the agricultural exemption, should it have concluded that fresh or frozen dressed poultry are not, "agricultural commodities?" These Appellant Railroads believe the answer to this question is quite clearly an affirmative one.

The Commission, which had given the matter most exhaustive treatment in the *Determination* case, decided that these commodities were not agricultural products. The Commission is charged with the administration and enforcement of the Act, and its interpretations were entitled to the greatest weight. Unless the Court below believed that the Commission's interpretations were, beyond doubt, arbitrary, senseless, or clearly wrong, they should have been sustained, for the Commission, in making its determination, was using the proper principles for construing the agricultural exemption. See *Levinson v. Spector Motor Service*, 330 U. S. 649, 672 (1947).

Assuming that the test for determining whether a particular item is an agricultural commodity, or a manufactured product thereof is that "as a result of some treatment" the original agricultural commodities "have been so changed as to possess new forms, qualities or properties or result in combinations" it would seem that there is much to be said for the Commission's determination respecting fresh or frozen dressed poultry and very little to be said against it. First, dressed poultry, whether fresh or frozen, is certainly a very different product from the live animals. Second, the processing which brings about the changed form is one that is done off the farm for it is generally carried on in large industrial plants that hire non-farm labor. Third, the processing is generally done by industrial concerns which are not engaged in farming. Fourth, the poultry when frozen takes on physical characteristics which result in a product that is not too different from canned or other preserved poultry, which all parties agree are not agricultural commodities.

Having in mind that other parties in this proceeding will devote considerable time in showing that fresh or frozen dressed poultry should be in the non-exempt category, these Appellant Railroads, in summary, urge that if it be concluded that the strict interpretation of the exemption is proper, the Commission's interpretation respecting these commodities is neither arbitrary, senseless, or inconsistent with the statute. Such interpretation should therefore have been sustained by the Court below. In holding otherwise the Court below was, these Appellant Railroads most respectfully submit, in error.

VIII

CONCLUSION AND REQUEST FOR RELIEF

It is most respectfully submitted for the reasons more fully stated above that this Court should:

1. Reverse the judgment of the Court below holding that the Commission's order in *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511 (1951), was not reviewable.

2. Order the Court below to review the Commission's order in *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511 (1951), in accordance with the principles statutory construction announced by this Court in such cases as *Piedmont and N. Ry. Co. v. Interstate Commerce Commission*, 286 U. S. 299 (1932) for construing exemptions from regulation contained in the Interstate Commerce Act.

3. Reverse the judgment of the Court below enjoining and restraining the Commission from enforcing its order in *East Texas Motor Freight Lines Inc. v. Frozen Food Express*, 62 M. C. C. 646 (1954) insofar as the Commission ordered Frozen Food Express to cease and desist from haul-

ing fresh or frozen dressed poultry in interstate commerce until it acquired a certificate or permit issued by the Commission covering the transportation thereof. The effect of this action by this Court will be to restore the Commission's cease and desist order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Carl Helmetag, Jr., attorney for the Appellant Railroads, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing Brief of the Appellant Railroads on the several parties to this action as follows:

1. On Frozen Food Express, by mailing copies in duly addressed envelopes, with air mail postage prepaid, to its attorneys of record, Carl L. Phinney, Esq., and Leroy Hallman, Esq., First National Banking Building, Dallas, Texas.

2. On the Secretary of Agriculture, by mailing copies in duly addressed envelopes with postage prepaid, to his attorneys, Honorable Robert L. Farrington, Honorable Neal Brooks, and Honorable Donald A. Campbell, United States Department of Agriculture, Washington 25, D. C.

3. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes with postage prepaid to its attorney, Honorable Leo H. Pou, Office of the Interstate Commerce Commission, Washington 25, D. C.

4. On the United States of America, by mailing copies in duly addressed envelopes, with postage prepaid, to its attorneys, Honorable Simon E. Sobeloff, the Solicitor General of the United States, Honorable Stanley N. Barnes, Assistant Attorney General, and Honorable Daniel Friedman, Special Assistant to the Attorney General, United States Department of Justice, Washington 25, D. C. and by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to its attorney of record, Honorable Malcolm R. Wilkey, United States Attorney, Houston, Texas.

5. On several interested parties, by mailing copies in duly addressed envelopes with postage prepaid to their re-

Certificate of Service

spective attorneys of record, to wit: David G. MacDonald, Esq. and Francis W. McNerny, Esq., Commonwealth Building, 1625 K Street, N. W., Washington 6, D. C.; Peter T. Beardsley, Esq., and Fritz Kahn, Esq., c/o American Trucking Associations, Inc., 1424 Sixteenth Street, N. W., Washington 6, D. C.; Dale C. Dillon, Esq., and Clarence D. Todd, Esq., 944 Washington Building, Washington 5, D. C., and by mailing copies in duly addressed envelopes, with air mail postage prepaid, to Rollo E. Kidwell, Esq., 301 Empire Bank Building, Dallas, Texas; and Lee Reeder, Esq., 1012 Baltimore Avenue, Kansas City 5, Missouri.

This 4th day of January, 1956.

CARL HELMETAG, JR.

APPENDIX "A"

Sections of the Administrative Procedure Act referred to:

Section 2(c)

"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances thereof or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

Section 4

Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) NOTICE—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except

where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) **PROCEDURES**—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) **EFFECTIVE DATES**—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) **PETITIONS**—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

Section 10

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) **RIGHT OF REVIEW.**—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) **FORM AND VENUE OF ACTION.**—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs or prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) **REVIEWABLE ACTS.**—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) **INTERIM RELIEF.**—Pending judicial review any agency is authorized, where it finds that justice so requires to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken

on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) **SCOPE OF REVIEW.**—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

APPENDIX "B"**LIST OF CLASS I RAILROADS**

The below listed Railroads are the individual carriers which, together, are designated as the "Appellant Railroads". When used, the term "Appellant Railroads" includes each of these named railroads:

Akron, Canton and Youngstown Railroad Company
The Ann Arbor Railroad Company
The Atchison, Topeka & Santa Fe Railway Company
Atlantic Coast Line Railroad Company
The Baltimore & Ohio Railroad Company
Bangor and Aroostook Railroad Company
Boston and Maine Railroad
Central of Georgia Railway Company
The Central Railroad Company of New Jersey
Chicago & Illinois Midland Railway Company
Chicago and Northwestern Railway Company
Chicago, Burlington & Quincy Railroad Company
Chicago, Great Western Railway Company
Chicago, Indianapolis and Louisville Railway Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago, Rock Island and Pacific Railroad Company
The Delaware and Hudson Railroad
The Delaware, Lackawanna and Western Railroad Company
The Denver and Rio Grande Western Railroad Company
The Detroit and Toledo Shore Line Railroad Company
Detroit, Toledo and Ironton Railroad Company
Duluth, South Shore and Atlantic Railway Company
(P. L. Solether, Trustee)

Elgin, Joliet and Eastern Railway Company

Erie Railroad

Florida East Coast Railway Company (John W. Martin, Trustee)

Fort Dodge, Des Moines & Southern Railway Company

Grand Trunk Railway System

Great Northern Railway Company

Green Bay & Western Railroad Company

Gulf, Mobile and Ohio Railroad Company

Illinois Central Railroad Company

The Kansas City Southern Railway Company

Lehigh and New England Railroad Company

Lehigh Valley Railroad Company

Maine Central Railroad Company

Midland Valley Railroad Company

The Minneapolis & St. Louis Railway Company

Minneapolis, St. Paul & Sault Ste. Marie Railroad Company

Missouri-Kansas-Texas Railroad Company

Missouri Pacific Railroad Company (Guy A. Thompson, Trustee)

The Nashville, Chattanooga & St. Louis Railway

New York Central System

The New York, Chicago & St. Louis Railroad Company

The New York, New Haven & Hartford Railroad Company

New York, Ontario and Western Railway

New York, Susquehanna and Western Railroad Company

Norfolk and Western Railway

Northern Pacific Railway Company

The Pennsylvania Railroad Company

The Pittsburgh and West Virginia Railway Company

Reading Company

St. Louis-San Francisco Railway Company

St. Louis Southern Railway Company

Seaboard Air Line Railroad Company
Southern Railway Company
Southern Pacific Company
The Texas and Pacific Railway Company
Toledo, Peoria & Western Railroad
Union Pacific Railroad Company
The Virginian Railway Company
Wabash Railroad Company
Western Maryland Railway
The Western Pacific Railroad Company